83-541

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

REPUBLIC INDUSTRIES, INC.,
Petitioner,

v.

TEAMSTERS JOINT COUNCIL
NO. 83 OF VIRGINIA PENSION FUND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does retroactive application of the "withdrawal liability" provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, *et seq.*, violate the Due Process Clause of the Fifth Amendment?**

2. Do the MPPAA provisions for assessment, collection and adjudication of "withdrawal liability" violate the Fifth and Seventh Amendments, and Article III, § 1, by taking property without just compensation and empowering self-interested private claimants to assess and collect money from their adversaries prior to any opportunity for impartial hearing, and to make "determinations" of fact and law, under vague language permitting the arbitrary and capricious exercise of discretion, which are later arbitrated but which are not subject to the *de novo* review of a private arbitrator, whose award is not subject to the *de novo* review of an Article III court?

**The certification requirements of 28 U.S.C. § 2403(a) may be applicable. The Clerk of the Court of Appeals for the Fourth Circuit certified to the Attorney General that the constitutionality of an Act of Congress was being drawn in question. Appendix at p. 52a.

PARTIES INVOLVED

The petitioner, Republic Industries, Inc. ("Republic"), is a closely held corporation organized under the laws of Delaware which has its principal place of business in Kansas City, Missouri. Dominion Banque shares, a Missouri bank holding company with its principal place of business in Kansas City, Missouri, may be deemed to be an affiliate of Republic.

The respondent, the Teamsters Joint Council No. 83 of Virginia Pension Fund (the "Fund"), is an unincorporated association established pursuant to an agreement and declaration of trust between various local unions in Virginia that are affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters") and various employers having collective bargaining agreements with those locals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Republic Industries, Inc. ("Republic"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered September 9, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the separately bound Appendix filed with this petition, at pp. 2a-31a. The District Court's opinion is reproduced in the Appendix at p. 32a. It is otherwise reported at 3 BNA Employee Benefits Cases [EBC] 2545 (E.D.Va. Dec. 29, 1982).

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1983. The jurisdiction of this Court is in-

voked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions directly involved are the Due Process Clause and the Just Compensation Clause of the Fifth Amendment, the Jury Trial Clause of the Seventh Amendment, and Article III, Section 1, of the Constitution of the United States. Additionally, petitioner relies by analogy on the principles underlying the Ex Post Facto and Bill of Attainder Clause of Article I, Section 9, Clause 3, and the Impairment of Contracts Clause of Article I, Section 10, Clause 1, insofar as they inform the meaning of the Due Process Clause of the Fifth Amendment. These constitutional provisions are reproduced in the Appendix at 54a.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, *et seq.*, which amended the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829, *et seq.* The relevant MPPAA provisions are reproduced in the Appendix at pp. 55a-149a, as set forth in the Statutes At Large. The MPPAA provisions are otherwise set forth at 29 U.S.C. §§ 1381, *et seq.* (Supp. V 1981). Cross-references to the United States Code citations have been provided in the Appendix, and the petition generally cites to the United States Code (Supp. V 1981) rather than the Statutes at Large.

STATEMENT

This case, like many others pending throughout the United States, involves federal constitutional challenges to the "withdrawal liability" provisions of the Multiem-

ployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381, *et seq.* (Supp. V 1981), pursuant to which Republic has been subjected to "withdrawal liability" claims exceeding its entire net worth that arise out of a pre-enactment "withdrawal."

In short, MPPAA requires an employer which permanently terminates its contributions to a multiemployer pension fund for any reason[1] to pay a "withdrawal liability," which is a portion of the unfunded vested benefit liability of the pension fund. *Id.* § 1381. The statute directs the pension fund itself to decide whether a "withdrawal" activating liability has occurred and, if so, the amount of the liability. *Id.* § 1382. In determining the amount owed to it, the fund and its actuary can use the data available, even if incomplete, and any actuarial assumptions that they deem reasonable "in the aggregate". *Id.* §§ 1393(a)(1), (b)(2). The fund also can use any one of several methods of allocating its unfunded liability to employers. *Id.* § 1391. The fund must set a schedule for payment of the liability and issue a notice and demand for payment, in accordance with the schedule, to the employer. *Id.* § 1399(c)(1). The statute renders the fund's claim

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[1] *See* 29 U.S.C. § 1383(a) (Supp. V 1981). In one case, an employer committed a "withdrawal" by terminating operations as a result of a municipality's exercise of its power of eminent domain. *Keith Fulton & Sons, Inc.* v. *New England Teamsters and Trucking Industry Pension Fund*, ___ F.Supp.—C.A. No. 81-2738-S (D.Mass. Aug. 3, 1983). In another, a "withdrawal" was committed when the employer's workers voted to decertify their bargaining representative, an action which had the result of terminating the employer's contributions to the particular pension fund affiliated with the decertified union. *Aronson Tire Co.* v. *Pisano*, No. 81-2554 (D.Mass. filed Oct. 7, 1981).

Though a permanent cessation of contributions, whether voluntary or involuntary, generally constitutes a "withdrawal" activating liability, there are exceptions made for certain industries. *See* 29 U.S.C. §§ 1383(b)-(d) (Supp. V 1981).

immediately payable on the schedule it has set notwithstanding any defenses the employer might assert to the claim. *Id.* § 1399(c)(2). The statute requires that disputes over the statutory validity of the claim or the amount of the liability be resolved by private arbitration. *Id.* § 1401(a)(1). Prior to and during arbitration, payments still must be made at the times and in the amounts the fund has demanded. *Id.* § 1401(d). In arbitration, all the "determinations" made by the fund are presumed correct "unless" shown to be "unreasonable or clearly erroneous," a provision which immunizes the fund's "determinations" from *de novo* review. *Id.* § 1401(a)(3)(A). The arbitration award is subject to judicial review, but it generally must be conducted in accordance with the provisions of MPPAA and the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, that preclude *de novo* review. *See* 9 U.S.C. § 10; 29 U.S.C. §§ 1401(b)(3), (c)(Supp. V 1981). MPPAA, which was not signed into law until September 26, 1980, retroactively imposes liability for all "withdrawals" occurring after April 28, 1980. 29 U.S.C. § 1461(e)(2)(A)(Supp. V 1981).

This case is one of six in which Republic challenges the constitutionality of retroactive application of the withdrawal liability provisions of MPPAA. The cases seek declaratory and injunctive relief from an aggregate of $19,744,000 in withdrawal liability claims asserted under MPPAA by various multiemployer pension funds, an amount that substantially exceeds Republic's entire net worth.[2] Unfortunately, jurisdictional and venue con-

[2] If paid on the installment-payment schedules unilaterally established by the funds, the aggregate amount claimed, with interest, exceeds $25,537,000. Republic's net worth as of August 1981 was $9,462,802. Its *pre*-tax income from continuing operations for its 1980 fiscal year was $595,505. The *annual* installments of withdrawal liability demanded by the funds approximate $4,000,000. Affidavit of R. B. Riss ¶¶ 43-45, Appendix at 160a-161a.

siderations precluded litigation of the constitutional issues raised by Republic in a single forum.[3] Three of Republic's other pending cases have been stayed, either *sua sponte* by the District Court, or by agreement of the parties. *Johnson Motor Lines, Inc., et al.* v. *Central States, Southeast and Southwest Areas Pension Fund*, No. 81 C 3703 (N.D. Ill. filed July 1, 1981); *Johnson Motor Lines, Inc., et al.* v. *Trucking Employees of North Jersey Welfare Fund Local 560 Pension Account*, No. 81-2344 (D.N.J. filed July 24, 1981); *Republic Industries, Inc.* v. *Central Pa. Teamsters Pension Fund*, 534 F.Supp. 1340 (E.D. Pa. 1982), *rev'd and remanded*, 693 F.2d 290 (3d Cir. 1982). In one case, Republic has interposed constitutional defenses in an action brought to collect unpaid installments of claimed withdrawal liability prior to arbitration of the validity of the fund's claim. *Teamsters Pension Fund of Philadelphia and Vicinity* v. *Republic Industries, Inc.*, No. 83-1070 (E.D. Pa. filed Mar. 3, 1983). In another, the District Court has declared MPPAA unconstitutional as retroactively applied and permanently enjoined its enforcement against Republic. *Republic Industries, Inc.* v. *New England Teamsters and Trucking Industry Pension Fund*, ___ F.Supp. ___, C.A. No. 81-2551-S (D. Mass. Aug. 3, 1983), *appeal docketed*, No. 83-1657 (1st Cir.). In the case at bar, the Court of Appeals affirmed the District Court's judgment that retroactive application of MPPAA is constitutional.

In addition to Republic's six cases, there are scores of other pending cases in which litigants are challenging the

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[3] The Judicial Panel on Multidistrict Litigation declined to consolidate cases, including Republic's, which attacked the constitutionality of MPPAA because, though raising common issues of law, they did not raise substantially common issues of fact. *In re Central States, Southeast and Southwest Areas Pension Fund "Withdrawal Liability" Litigation*, MDL No. 495 (J.P.M.L. March 9, 1982).

constitutionality of MPPAA's withdrawal liability provisions, more than 70 of which involve MPPAA's retroactive application. Jurisdictional Statement, *Pension Benefit Guaranty Corp.* v. *R. A. Gray & Co.*, No. 83-245, at 11 & App. E, pp. 53a-75a (U.S. filed Aug. 15, 1983). Many, if not most, involve constitutional claims substantially similar to those asserted by Republic. As the Court of Appeals recognized, Appendix at 16a, its decision upholding the constitutionality of retroactive application of MPPAA is in square conflict with the contrary decision of the Court of Appeals for the Ninth Circuit in *Shelter Framing Corp.* v. *Pension Benefit Guaranty Corp.*, 705 F.2d 1502 (9th Cir. 1983), from which the Pension Benefit Guaranty Corporation ("PBGC") has filed what purports to be an appeal of right under 28 U.S.C. § 1252 in this Court.[4] *Ibid.*

This action arose out of the termination of the operations of Johnson Motor Lines, Inc., Republic's predecessor in interest,[5] on August 8, 1980. Prior thereto, Johnson had been an interstate motor carrier of freight and, pursuant to various collective bargaining agreements with

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[4] PBGC is a corporation—established within, but having an identity independent of, the Department of Labor—which presumably has independent litigating authority in this Court that other "agencies" of the United States, 28 U.S.C. § 1252, do not. *Compare* 28 U.S.C. § 518(a) (Supp. V 1981), *with* 29 U.S.C. §§ 1302(b), (f) (Supp. V 1981). PBGC was created for the purpose of insuring the payment of pension benefits guaranteed under ERISA. 29 U.S.C. § 1302(a) (1976). As an insurer, its contractual obligations to multiemployer funds give it a significant pecuniary state in the enforceability of MPPAA's "withdrawal liability" provisions.

[5] Republic acquired 100% of Johnson's stock in June 1979. After the termination of its operations, Johnson's assets were sold. Those that could not be sold to third parties were acquired by Republic, as Johnson was liquidated pursuant to 26 U.S.C. §§ 334(b) and 337, and dissolved under the law of the State of North Carolina. Affidavit of R. B. Riss (hereinafter "Riss Aff.") ¶¶ 32-33, Appendix at 158a.

Teamsters locals, had made periodic contributions to various multiemployer pension funds, including respondent. Those agreements required that defined contributions be made in exchange for specified units of work. When the work stopped, the contractual duty to contribute ceased as a consequence.

At the time Johnson's business was terminated because of severe operating losses and lender pressure, none of its officers or directors, nor any of Republic's, had any knowledge that they would or might create a "withdrawal liability" by ending Johnson's operations, and they received no advice from their attorneys or accountants that any such liability did or might exist. Riss Aff. ¶¶ 30-31, Appendix at 157a-158a. Moreover, under the law in effect at the time the MPPAA-liability-activating event occurred, ERISA imposed no liability on Johnson for cessation of its pension contributions.[6] Seven weeks later, MPPAA became law. It defines the cessation of pension contributions resulting from the closing of Johnson's business as a "withdrawal" and subjects Republic to claims based on Johnson's pre-enactment "withdrawal" that substantially exceeds Republic's entire net worth.

Johnson had already received a demand to pay over $16,000,000 in withdrawal liability from another fund when respondent's counsel sent Johnson a letter, dated July 3, 1981, which declared Johnson's withdrawal liabil-

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[6] Johnson, however, was subject to a contingent termination liability, payable to PBGC, that would be activated only if: (1) a multiemployer pension fund terminated with an unfunded vested benefit liability, and (2) the PBGC exercised discretion to insure fund benefits. If PBGC chose to insure the terminated fund's benefits, all employers which had contributed to the fund during the five years prior to its termination were required to reimburse PBGC for any funds it paid out, but no employer's share of this contingent termination liability could exceed 30% of its net worth. 29 U.S.C. §§ 1362(b)(2), 1364 (1976).

ity to be $189,107. Unlike the other fund, however, Respondent had concluded that the statute's "trucking industry" exception applied, and therefore demanded that, in lieu of payment of the liability claimed, Johnson post security for 50% of the claim pending a PBGC determination whether the Fund's contribution base had been "substantially damaged" by Johnson's withdrawal. 29 U.S.C. § 1383(d)(Supp. V 1981); Appendix, p. 167a.

In response, Republic protested that the Fund had erred in calculating the amount owed by failing to exclude contributions made on behalf of employees who worked at a truck terminal that had been closed prior to April 29, 1980. *See id.* § 1397(a)(2). Once those contributions were excluded, the amount claimed would become *de minimis*. *See id.* § 1389; Appendix, p. 168a.

The Fund rejected Republic's reliance on § 1397(a)(2) because it determined that the closed truck terminal was not a "facility" within the meaning of the statute, and that the transfer of five employees from that terminal to another terminal located eight miles away would render that provision inapplicable in any event. On the basis of this statutory "determination," *id.* § 1401(a)(3), the Fund reiterated its demand for security. Appendix at 173a-174a.

Republic then tendered an irrevocable letter of credit as security. Thereafter, while the Fund was considering whether the letter of credit was acceptable security in the event of Republic's bankruptcy, it advised Republic that it was in the process of re-examining whether the trucking industry exception applied because of its uncertainty over the statutory meaning of the term "employer."[7] Republic protested that the Fund had no right to revoke its

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[7] The uncertainty was whether, in determining if the Fund derived "substantially all of [its] contributions . . . [from] *employers* primarily engaged in the short and long haul trucking industry," 29 U.S.C.

prior determination that the "trucking industry" exception applied. The Fund disagreed. And, over a year after making its initial demand for security under § 1383(d), the Fund advised Johnson that it had determined the exception did not apply and that Johnson therefore was required to begin paying the amount claimed on the schedule set by the Fund, prior to and during any arbitration of its "determination" of the exception's inapplicability. Id. § 1401(a)(3); Appendix, pp. 179a-183a.

Republic then invoked the jurisdiction of an Article III court constitutionally empowered to say what the law means by filing this action for declaratory and injunctive relief, in which Republic challenged the constitutionality of the withdrawal liability provisions of MPPAA. The Fund moved to dismiss on the ground that Republic had failed to exhaust the private arbitration process mandated by the statute for the resolution of "withdrawal liability" disputes. Republic moved for a preliminary injunction. After the Court had denied both motions, the Fund answered and counterclaimed for payment of the withdrawal liability claimed, and Republic asserted its statutory defense under 29 U.S.C. § 1397(a)(2) (Supp. V 1981). Ruling on cross-motions for summary judgment, the District Court concluded that it could not decide the statutory defense raised by Republic, as the Court believed that the question whether the truck terminal closed in 1979 was a "facility" should be left for the private arbitrator. The Court, granting the Fund's cross-motion for summary judgment, entered the declaratory judgment upholding MPPAA's constitutionality, which has been affirmed by the Court of Appeals.

§ 1383(d)(2)(Supp. V 1981) (emphasis added), the Fund should look only to the employers which actually made the contributions, *e.g.*, Johnson, or rather to any "control groups" to which the contributing employers might belong, *e.g.*, Republic. *See* 29 U.S.C. § 1301(b)(1), *construed in PBGC* v. *Ouimet Corp.*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981).

REASONS FOR GRANTING THE WRIT

In so far as it upholds the constitutionality of retroactive application of the withdrawal liability provisions of MPPAA, the decision of the Fourth Circuit is in square conflict with the decision of the Ninth Circuit in *Shelter Framing Corp.* v. *PBGC*, 705 F.2d 1502 (9th Cir. 1983), which is reason enough to grant the writ. *See* Sup. Ct. Rule 17.1(a).

The existence of this inter-Circuit conflict illustrates the need for this Court to re-examine its prior precedents, for the inter-Circuit conflict is largely the product of the inconsistent results this Court itself has reached respecting the constitutionality of retroactive statutes. Lacking clear guidelines from this Court, the lower courts have applied the four-pronged constitutional test articulated by the Seventh Circuit in *Nachman Corp.* v. *PBGC*, 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional issues*, 442 U.S. 940 (1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980), which has never received this Court's stamp of approval.

This Court should harmonize its inconsistent precedents, and articulate a clear standard of review for legislation which is not only retrospective in effect but also retroactive in application. This can be done most effectively by focusing on, and squarely addressing, the question whether the citizen's right to notice and fair warning is a "fundamental" constitutional right that, when impaired by a statute imposing a disabling civil liability triggered by pre-enactment conduct, shifts to the Government the burden of advancing an extraordinary justification for a statute which deprives the citizen of any opportunity to choose his course of conduct in light of the law in effect at the time he acts.

In addition, the petition presents a number of other federal constitutional issues respecting the validity of

MPPAA's provisions for the assessment, collection and adjudication of "withdrawal liability" claims, questions which were erroneously decided by the Court of Appeals, which are substantial, and which warrant this Court's attention if the Court upholds the constitutionality of retroactive application of MPPAA.

I

An Inter-Circuit Conflict Exists As To Whether Retroactive Application Of MPPAA Is Constitutional

That the Fourth Circuit's decision upholding the constitutionality of retroactive application of MPPAA is in square conflict with the Ninth Circuit's ruling in *Shelter Framing Corp.* v. *PBGC*, 705 F.2d 1502 (9th Cir. 1983), is apparent from the face of its opinion. Appendix at 14a-19a. The District Courts are in sharp conflict on this question as well. *Compare, e.g., Coronet Dodge, Inc.* v. *Speckmann*, 553 F.Supp. 518 (E.D. Mo. 1982), *appeal docketed*, No. 82-2554 (8th Cir.); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 549 F.Supp. 404 (S.D.N.Y. 1982), *appeal docketed*, No. 83-7004 (2nd Cir.); and *Peick* v. *PBGC*, 539 F.Supp. 1025 (N.D. Ill. 1982), *appeal docketed*, No. 82-2081 (7th Cir.); *with Warner-Lambert Co.* v. *United Retail and Wholesale Employees Teamster Local No. 115 Pension Plan*, ___ F.Supp. ___, C.A. No. 82-1080 (E.D. Pa. Aug. 10, 1983), *appeal docketed*, No. 83-1676 (3rd Cir.); *Republic Industries, Inc.* v. *New England Teamsters and Trucking Pension Fund*, ___ F.Supp. ___, C.A. No. 82-2551 (D. Mass. Aug. 3, 1983), *appeal docketed*, No. 83-1657 (1st Cir.); and *Sibley, Lindsay & Curr Co.* v. *Bakery, Confectionery & Tobacco Workers Int'l Union*, 566 F.Supp. 32 (W.D.N.Y. 1983), *appeal docketed*, No. 83-7328 (2nd Cir.).

That the lower courts are in conflict should not be surprising for this Court has sent inconsistent signals to

the lower courts with respect to the constitutionality of statutes which are retroactive either in application or effect. *Compare, e.g., Allied Structural Steel Co* v *Spannaus*, 438 U.S. 234 (1978); *Railroad Retirement Bd.* v. *Alton R.R. Co.*, 295 U.S. 330 (1935); *and Untermyer* v. *Anderson*, 276 U.S. 440 (1928); *with United States* v. *Darusmont*, 449 U.S. 292 (1981); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); and *Veix* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940). *See also United States* v. *Security Industrial Bank*, 51 U.S.L.W. 4007 (U.S. Nov. 30, 1982).

Wanting clear guidance from this Court, all the lower courts that have addressed the constitutionality of retroactive application of MPPAA have been forced to resort to the nebulous, four-pronged test first articulated by the Seventh Circuit in *Nachman Corp.* v. *PBGC*, 592 F.2d 947 (7th Cir. 1979), which several courts have assumed bears the *imprimatur* of this Court because it declined to review the constitutional questions presented in *Nachman*, 442 U.S. 940 (1979), and affirmed the judgment on statutory grounds,[8] 446 U.S. 359 (1980). *See, e.g., A-T-O, Inc.* v. *PBGC*, 634 F.2d 1013, 1024 (6th Cir.

[8] In *Nachman* the Seventh Circuit "was required to confront petitioner's constitutional argument," 446 U.S. at 367, only because it had construed the statute as altering the employer's contractual obligations to the pension fund by "invalidat[ing] exclusion of liability clauses in pension plans agreed upon prior to ERISA." 592 F.2d at 958. This Court, in contrast, said that the termination liability provisions of ERISA did not "deny employers any right to place a contractual limit on their direct liability to their employees." 446 U.S. at 385. Rather, ERISA created a "new liability," triggered by post-enactment conduct, that was payable to PBGC, not the pension fund, *id.* at 383, that "careful[ly] . . . approached the problem of retroactivity," *id.* at 382, and that placed a "reasonable ceiling" on employer liability, *id.* at 386. Given this Court's construction of the statute, it is questionable whether there was any constitutional problem to address.

1980); *PBGC* v. *Ouimet Corp.*, 630 F.2d 4, 12 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); *Peick* v. *PBGC*, 539 F.Supp. 1025, 1040 (N.D. Ill. 1982), *appeal docketed*, No. 82-2081 (7th Cir.). That certain lower courts have seized upon the denial of *certiorari* in *Nachman* as a basis for upholding retroactive application of MPPAA under the *Nachman* test simply underscores how much the lower courts need further guidance, for this Court has, time and again, unequivocally told the lower courts not to construe a denial of certiorari as any *sub silentio* indication that this Court "approves" either the result or the reasoning of the court whose judgment is sought to be reviewed. *E.g.*, *Hughes Tool Co.* v. *TWA, Inc.*, 409 U.S. 363, 365 n.1 (1973); *Brown* v. *Allen*, 344 U.S. 443, 489-97 (1953); *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-19 (1950). To the extent that the judgment of the Court of Appeals is founded upon any such misapprehension, it is clearly erroneous. *See* Appendix at 13a, n.9.

That an inter-Circuit conflict exists notwithstanding a unanimity of opinion regarding the applicability of the *Nachman* test, which purports to elucidate the standard of review articulated in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), obfuscates the real basis for the conflict. The conflict exists, not because the Ninth Circuit and the Fourth Circuit reached inconsistent judgments regarding the appropriate factors to be weighed, but rather principally because the Ninth Circuit believes that the citizen has a right to rely on the law in effect at the time he acts and is not required to guess what the law will become, 705 F.2d at 1511, while the Fourth Circuit believes that bills pending in Congress can give constitutionally adequate notice and fair warning even though they are not part of the law of the land, Appendix at 17a. Even assuming, *arguendo*, that the *Nachman* test governs the constitutionality of a statute which is retroac-

tive in application—like MPPAA, but unlike the *Nachman* statute which applied only prospectively—this Court must reconcile the conflicting notice standards applied by the Ninth and Fourth Circuits.

That a conflict exists is, in large measure, attributable to seemingly inconsistent precedents of this Court. In *United States* v. *Darusmont*, 449 U.S. 292 (1981), this Court upheld the constitutionality of a federal income tax statute which merely increased the rate of taxation and decreased the allowable exemption involved but which did not create any "new tax." *Id.* at 299-300. In that factual context, the Court responded to the taxpayer's contention that he "had no notice, either actual or constructive, of the forthcoming . . . changes" by noting that he was "hardly in a position to claim surprise" for the "proposed increase in rate had been under public discussion for almost a year before its enactment" and the taxpayer therefore had "ample advance notice of the increase." *Id.* at 299.

In *Untermyer* v. *Anderson*, 276 U.S. 440 (1928), however, this Court declared unconstitutional retroactive application of a gift tax statute which created a new tax, even though a final House-Senate conference report on the bill was near approval when the taxpayer made the gift which was not taxable under the law in effect at the time he acted. Responding to the contention that it was not unconstitutional to apply the statute to a transaction that occurred "while the bill containing the questioned provisions was in the last stage of progress through Congress," this Court ruled that the taxpayer "may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures." *Id.* at 445-46.

One District Court whose analysis has been relied upon by nearly every court that has upheld the con-

stitutionality of retroactive application of MPPAA, including the District Court and the Fourth Circuit in the case at bar, appears to have concluded that *Untermyer* was effectively overruled by *Darusmont. See Peick* v. *PBGC*, 539 F.Supp. 1025, 1054 n.73 (N.D. Ill. 1982), *appeal pending*, No. 82-2081 (7th Cir.). It was not. *Untermyer* was discussed with apparent approval in *Darusmont* and distinguished. *See* 449 U.S. at 299. And, the cases are distinguishable.

Statutes which alter merely the rate of taxation but which do not create a new tax do not deprive the citizen of notice and fair warning of the conduct triggering the increased liability, even when applied retroactively. Moreover, contrary to the views of the Fourth Circuit, Appendix at 17a, tax cases are *sui generis* because taxes are simply "a way of apportioning the cost of government" from which "no citizen enjoys immunity" because all citizens share in the benefits thereof. *Welch* v. *Henry*, 305 U.S. 134, 146-47 (1938). As *Darusmont* makes clear, not all tax cases are alike. Income tax cases are not like gift tax cases. 449 U.S. at 299. The income taxpayer, unlike the taxpayer who makes a gift not taxable when made, is unlikely to bite off his nose to spite his face, *i.e.*, refuse income, simply because the Government needs a somewhat larger share.

For all these and other reasons, the Fourth Circuit's reliance on *Darusmont* and *United States* v. *Hudson*, 299 U.S. 498 (1937), another income tax case, for the proposition that Republic and Johnson had "fair warning" of its "potential liability," Appendix at 17a, was misplaced. MPPAA did not alter merely the remedial consequences of primary duties already defined by the law in effect at the time the conduct occurred. MPPAA created a *new* liability-creating incident—"withdrawal." Contrary to the apparent belief of the Fourth Circuit, the law in effect

at the time Johnson's business was terminated did not impose any "withdrawal liability," Appendix at 17a, for the cessation of pension contributions resulting from an employer's going out of business. It provided merely a contingent liability, triggered by entirely different incidents — fund termination and the PBGC's decision to act as fund insurer. The liability was payable to PBGC, not the terminated fund. And, the reimbursement liability was prospectively applied and carefully limited in several respects. *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 382-86 (1980). Johnson was not "regulated *in the particular* to which [it] now objects" when it ceased business. *Veix* v. *Sixth Ward Bldg. Ass'n*, 310 U.S. 32, 38 (1940) (emphasis added). At that time it owed no statutory duties at all to the pension funds.

The Fourth Circuit's reliance on *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), also was misplaced. *Usery* upheld the constitutionality of a statute requiring employers to compensate employees who had left their jobs prior to enactment of the statute. To be sure, the statute had "some retrospective effect" insofar as it imposed liability for an injury "bred" in the past. *Id.* at 15-16. But, in application, it was almost entirely prospective. The liability imposed was triggered by the manifestation of a progressive disease whose "symptoms may become apparent only *after* a miner has left the coal mines." *Id.* at 7-8 (emphasis added). The employers were "not ordinarily [held] liable for any disabilities maturing before enactment"; the Government paid all claims filed for the first three-and-one-half years after enactment; and, the workmen's compensation was for a specific, physical injury caused by the dangerous working conditions controlled by the employers under which the miners labored,[9] a fact that distinguished *Railroad Retirement*

[9] In contrast, the unfunded liability allocated as withdrawal liability was not caused by any act of, or condition created by, Johnson or

Bd. v. *Alton R.R. Co.*, 295 U.S. 330 (1935), which petitioner submits is controlling here. 428 U.S. at 8-10, 15 & nn. 14, 18.

Moreover, in *Usery* the employers had not "specifically pressed the contention" that they would have acted differently. *Id.* at 17. That contention *is* pressed by this petitioner, which "would have avoided liability by altering [its] conduct" if its officers and directors "could have anticipated the potential liability attaching to [their] chosen course of conduct" that, under the law in effect at the time they acted, did not trigger the imposition of any liability. *Id.* at 17 n.16. *See* Riss Aff. ¶¶ 30-31, Appendix at 157a-158a.

This Court must resolve the inter-Circuit conflict created by the Fourth Circuit and, in the process, should attempt to harmonize *Untermeyer* and *Alton* on the one hand, with *Darusmont* and *Usery* on the other hand. In resolving the conflict, the Court also must consider the implications of its Contract Clause decisions such as *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), and *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), insofar as they inform the meaning of the

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Republic, but rather by forces wholly outside their control. Affidavit of Joseph LoCicero ¶ 16, Appendix at 191a-193a. As the financial "problem" of the funds that Congress sought to remedy, Appendix at 16a, was not caused by the employers, a blameworthiness rationale cannot justify the retroactive application of MPPAA. And, to the extent a cost-benefit analysis is relevant, it cannot *fairly* be said on the summary judgment record before the Court of Appeals that the "costs" being allocated to Republic are in any way commensurate with the "benefits" that either Republic or Johnson derived from their employees' labor. *Compare* Appendix at 18a, *with* Riss Aff. ¶¶ 43-50, Appendix at 160a-163a.

Due Process Clause.[10] *See also United States* v. *Security Industrial Bank*, 51 U.S.L.W. 4007 (U.S. Nov. 30, 1982).

Petitioner submits, however, that this Court is likely to foster further lower-court confusion in the future unless it squarely confronts a constitutional question raised below that the Fourth Circuit did not address, namely, whether the citizen's right to notice and fair warning is a "fundamental" one, or at least a sufficiently important one to trigger a different standard of review in assessing the constitutionality of statutes which impose an ostensibly "civil," but nonetheless disabling, liability triggered by pre-enactment conduct. Even if the standard of review described in *Usery* is appropriate for statutes having retrospective "effects" but which are substantially prospective in application, it is erroneous when applied to statutes, like MPPAA, which impose a new liability for primary conduct not triggering liability under the law in effect at the time the citizen acted. Such a statute infringes what petitioner submits is a "fundamental" right to "fair warning," *Marks* v. *United States*, 430 U.S. 188, 191-92 (1977), even if the liability imposed is labelled "civil," rather than "criminal," for irrespective of any "harsh and oppressive" effects on the citizen's property rights, *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 n.13 (1977), it also deprives the citizen of a significant liberty interest—the opportunity to choose one's course of conduct in light of the law in effect at the time one acts, an opportunity that cannot exist if, as the

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[10] Although rejecting petitioner's contention that retroactive application of MPPAA violates the Due Process Clause by enlarging petitioner's contractually defined contribution obligation to the pension fund, which was executed, as opposed to executory, at the time of MPPAA's enactment, the Court of Appeals made no effort even to distinguish *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), which was decided after the *Usery* case on which the Court otherwise relied.

Fourth Circuit ruled, a citizen is "required at peril of life, liberty or property to speculate" as to the outcome of bills pending in Congress. *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

This Court has unequivocally stated that it is a presupposition of any "rule of law" that the citizen is "*entitled* to be informed as to what the state commands or forbids." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972) (emphasis added). Fair warning of what the law is, not what it might or will become, is essential if the citizen is to have an opportunity to choose a liability-avoiding course of conduct. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Republic never had an opportunity to choose between corporate life and death in light of the law in effect when Johnson's business was terminated.

If the right to fair notice which this Court has described as an "elementary and fundamental requirement of due process," *Mennonite Bd. of Missions* v. *Adams*, 51 U.S.L.W. 4872, 4873 (U.S. June 22, 1983), is to receive the protection it deserves, the Court must articulate a standard of review for statutes which are retroactive *in application* that allocates the risk of error in favor of the citizen's fundamental right to notice and fair warning. When Congress seeks to legislate retroactively with respect to closed transactions and executed, as opposed to executory, contractual obligations, it should be required to advance an extraordinary justification for retroactive application of statutes creating new liability-imposing incidents, other than the deterrence of primary conduct, which prior Congresses chose to leave unregulated in the particular to which a subsequent Congress seeks to subject it to retroactive regulation. *See also INS* v. *Chadha*, 51 U.S.L.W. 4907, 4914-18 (U.S. June 21, 1983). As this Court said in *Usery*, courts should be "hesita[nt] to ap-

prove the retrospective imposition of liability on any theory of deterrence," 428 U.S. at 17, the very rationale on which retroactive application of MPPAA was justified by the Court of Appeals. Appendix at 18a.

II

The Other Constitutional Questions Are Substantial And Warrant This Court's Attention If Retroactive Application Of MPPAA Is Constitutional

Petitioner has raised a number of other constitutional challenges to MPPAA under the Fifth and Seventh Amendments, and Article III, that are substantial and warrant this Court's attention if the Court upholds the constitutionality of retroactive application of MPPAA. Although an inter-Circuit conflict does not yet exist, the Fourth Circuit's ruling on the other constitutional issues presented are inconsistent with prior decisions of this Court. The same issues have been raised in scores of cases now pending in the lower courts, and it makes little practical sense to have the many funds and employers affected by the Act, as well as the arbitrators and courts who must review fund determinations, using procedures for the assessment, collection and adjudication of "withdrawal liability" claims which are of uncertain constitutionality.[11]

The lower courts have uniformly rejected the argument that MPPAA's compulsory arbitration provision violates either the Due Process Clause or the Seventh Amendment. But this Court has declared compulsory

[11] The questions respecting the constitutionality of MPPAA procedures and the taking-without-compensation issue, which were decided by the Fourth Circuit, are not presented in *PBGC* v. *R.A. Gray Co.*, No. 83-245 (U.S. filed August 15, 1983), as the Ninth Circuit mooted them by holding MPPAA unconstitutional as retroactively applied.

arbitration statutes unconstitutional in the past, *Wolff Packing Co.* v. *Industrial Court*, 267 U.S. 552 (1924), *Dorchy* v. *Kansas*, 264 U.S. 286 (1924), and these precedents have never been overruled. *See, e.g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974). And, the contrary authority on which the Fourth Circuit relied, *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320, 322 (1972), is distinguishable because it involved the delegation of adjudicatory power to a specialized administrative agency of the Government, not to a *private* arbitrator, for whom no qualifications are even prescribed by MPPAA.

Atlas Roofing Co. v. *OSHA*, 430 U.S. 442, 458 (1977), and *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), are likewise distinguishable for the same reason. A private arbitrator is not a federal administrative agency. Private arbitration is not administrative adjudication. And, the adjudication of money claims made by one private entity against another private entity do not involve any rights of the sovereign. *See*, 29 U.S.C. § 1302(b), (f) (Supp. V 1981). The Seventh Amendment has never been held applicable to the States, the source of "common law" rights and duties, and there is no "federal general common law." *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938). If Congress has power to compel the adjudication of every federal statutory right via *private* arbitration simply because the rights and the arbitral process are "unknown at common law," Appendix at 24a, then the Seventh Amendment imposes no lasting restraints on Congress at all, and the valued right to trial by jury becomes wholly dependent on Congressional discretion, which the Founding Fathers obviously sought to limit somehow by constitutional text. The Fourth Circuit's rationale, founded upon the erroneous assumptions that private arbitration is administrative adjudication, and that withdrawal liability demands for money involve "public rights," cannot be harmonized with prior decisions of this Court. *See, e.g.*,

Northern Pipeline Constr. Co. v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982); *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962).

The Fourth Circuit's rejection of petitioner's bias argument is also erroneous. It is precisely because the trustees are "fiduciaries" having a duty of undivided loyalty to fund beneficiaries, *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), that creates "an inherent bias in making overly liberal assessments of withdrawal liability so as to favor employees." Appendix at 20a. As the claimants of money, the trustees obviously have a pecuniary interest in the outcome of the "determinations" MPPAA requires them to make. That the trustees employ an actuary does not obviate their inherent bias, as the actuary is paid by, and subject to the direction of, the trustees in whom MPPAA vests the authority to make the statutorily mandated "determinations" later arbitrated. And, to suggest that the determination of the Fund's unfunded vested liability involves only "ministerial" or "mechanical" arithmetical calculations, Appendix at 21a, n.13, as opposed to an exercise of substantial *discretion*, is simply inconsistent with the summary judgment record. *See* Affidavit of Joseph LoCicero ¶¶ 9, 16.12, Appendix at 187a, 192a; Note, *Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures of [MPPAA]*, 71 Geo. L.J. 161 (1982).

Perhaps none of the foregoing factors, standing alone, renders the adjudicatory scheme violative of due process. But the trustees' bias is not cured by the provisions for arbitration and judicial review, for the trustees self-interested "determinations" are not subject to *de novo* review. 29 U.S.C. § 1401(a)(3). Regardless of any "actual" bias, the private arbitrator cannot be an "impartial" adjudicator, exercising *independent* judgment, in

the constitutional sense because he simply has no power of *de novo* review. *See North* v. *Russell*, 427 U.S. 328, 333-34 (1976); *Gibson* v. *Berryhill*, 411 U.S. 564, 577 & n.16 (1973); *Ward* v. *Monroeville*, 409 U.S. 57, 61-62 (1972).

That the arbitrator's award, in turn, is not subject to *de novo* judicial review also raises troubling Article III questions. If, as the Fourth Circuit held, the "determination" whether 29 U.S.C. § 1397(a)(2) (Supp. V 1981) applies involves a "nice question of fact and law," Appendix at 10a, how can Congress constitutionally "require such a [mixed] question [of fact and law] to be decided by [a *private*] arbitrator," Appendix at 10a, whose award is not subject to the *de novo* review of an Article III court, particularly when Congress has not even defined what a "facility" is? *Cf.*, *Northern Pipeline Constr. Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982); *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 712 F.2d 1305, (9th Cir. 1983). The private arbitrator to whom MPPAA commits the adjudication of a federal statutory right cannot be an "adjunct" of the District Court—like a federal bankruptcy judge or a federal magistrate—if his award is not subject to *de novo* review, and he certainly is not a properly constituted legislative court. *See, e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962).

And, notwithstanding the Fourth Circuit's blithe dismissal of petitioner's "taking" claim, Appendix at 25a-26a, a substantial question is presented under the Just Compensation Clause as well. MPPAA subjects petitioner to presumptively valid, potentially conclusive and immediately payable "withdrawal liability" claims that substantially exceed petitioner's entire net worth. 29 U.S.C. §§ 1399(c)(2), 1401(a), (b)(1). MPPAA does not regulate the use of property; it confiscates Peter's for the ultimate

benefit of Paul. Because MPPAA confers no reciprocal benefit on those whose property is taken, and because MPPAA's confiscatory effect is not "a mere 'consequential incidence' of a valid regulatory measure," the "analytical framework employed in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 194 (1978)," on which the Court of Appeals relied, simply does not fit this case. *United States* v. *Security Industrial Bank*, 51 U.S.L.W. 4007, 4009 (U.S. Nov. 30, 1982). *See Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965); *Brooks-Scanlon Co.* v. *Railroad Comm'n*, 251 U.S. 396 (1920); *In re Central R.R. Co. of New Jersey*, 485 F.2d 208, 213 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974).

Finally, the Fourth Circuit's conclusions that MPPAA's prepayment mandate is constitutional and that MPPAA's provisions are sufficiently precise to withstand due process scrutiny, are inconsistent with the record and wholly ignore that no process of any kind exists "to guard against the risk of initial error," *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 608 (1969), and protect petitioner from the pecuniary self-interest which infects the *ex parte*, standardless "determinations" of the fact and amount of liability made by the trustee claimants who establish the payment schedule.[12]

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[12] In asserting that it could not "perceive how payment of the periodic installments as they become due and owing could constitute a crushing economic burden on Republic," Appendix at 23a-24a, the Fourth Circuit simply ignored facts of record showing that compliance with the periodic payments demanded by all the funds which have asserted claims against Republic would constitute a crushing economic burden. *See* Riss Aff. ¶¶ 43-46, 48-49, Appendix at 160a, 161a, 162a. And, until an impartial adjudicator passes on the "determinations" of law and fact underlying the demand of a self-interested claimant, in what sense can it constitutionally be said the money is "due and owing" simply because it's been demanded? The

As one commentator has aptly said, the purpose and effect of the MPPAA provisions for the assessment, collection and adjudication of "withdrawal liability" disputes is to trade fairness for efficiency. Note, *Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures* of the [MPPAA], 71 Geo. L.J. 161 (1982). They raise substantial constitutional questions warranting this Court's attention should it uphold the constitutionality of retroactive application of MPPAA.

Court simply chose to ignore evidence that the "determinations" on which the payment schedule is based create a substantial risk of error and involve a substantial exercise of discretion. Affidavit of Joseph LoCicero ¶¶ 16.21-16.27, Appendix at 193a-200a. Indeed, in this very case, the Fund has admitted that its initial calculation of withdrawal liability was erroneous, Appendix at 201a-202a, has admitted uncertainty as to the meaning of the vague language defining when a permanent cessation of contributions is *not* a "withdrawal," 29 U.S.C. § 1383(d), and has determined that a truck terminal is not a "facility" within the meaning of 29 U.S.C. § 1397(a)(2), an arbitrable "determination" presenting a "nice question of fact and law," Appendix at 10a, the answer to which can hardly be regarded as self-evident since Congress did not even bother to define what a "facility" is, or any of the key terms of § 1383(d), which first applied in this case and then, *ipse dixit*, did not. This is delegation run wild that permits the arbitrary and capricious exercise of discretion by self-interested claimants. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972); *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari and accompanying Appendix were served, by first class mail, postage prepaid, this 29th day of September 1983 upon:

(a) Pursuant to Sup.Ct. Rule 28.3,

Antonia B. Ianniello
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(b) Pursuant to Sup.Ct. Rule 28.4(b),

Solicitor General of the United States
Department of Justice
10th and Constitution Avenue, N.W.
Room 5143
Washington, D.C. 20530

/s/ Louis T. Urbanczyk
LOUIS T. URBANCZYK

83-541

No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

REPUBLIC INDUSTRIES, INC.,

Petitioner,

v.

TEAMSTERS JOINT COUNCIL NO. 83
OF VIRGINIA PENSION FUND,

Respondent.

Appendix To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Appellee.

PENSION BENEFIT GUARANTY CORP.
Amicus Curiae

No. 83-1109

REPUBLIC INDUSTRIES, INC., a Del. Corp.,
Appellee,

v.

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Appellant.

PENSION BENEFIT GUARANTY CORP.
Amicus Curiae

No. 83-1119

REPUBLIC INDUSTRIES, INC., a Del. Corp.,
Appellee,

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TEAMSTERS JOINT COUNCIL NO. 83 OF VIRGINIA PENSION FUND, an unincorporated assoc.,
Appellant.

PENSION BENEFIT GUARANTY CORP.
Amicus Curiae

No. 83-1196

REPUBLIC INDUSTRIES, INC., a Del. Corp.,
Appellant,

v.

TEAMSTERS JOINT COUNCIL NO. 83 OF VIRGINIA PENSION FUND, an unincorporated assoc.,
Appellee.

Appeals From The United States District Court For The Eastern District Of Virginia, At Alexandria. Albert V. Bryan, Jr., District Judge.

Argued June 9, 1983 Decided September 9, 1983

Before WINTER, Chief Judge, RUSSELL, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge.

Lester M. Bridgeman (Louis T. Urbanczyk; Philip B. Kurland, John J. Coffey, III, Christopher G. Walsh, Jr., Rothschild, Barry & Myers on brief) for Appellant; Paul J. Ondrasik, Jr. (Antonia B. Ianniello, Steptoe & Johnson Chartered on brief) for Appellee; (Henry Rose, General Council, Baruch A.

Fellner, Associate General Council, J. Stephen Caflisch, Special Council, Peter H. Gould, Terence G. Craig, David F. Power, Office of the General Counsel on brief) for Amicus Curiae Pension Benefit Guaranty Corporation.

WINTER, Chief Judge:

The principal issue in these cross appeals is the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980 (1980 Act), 29 U.S.C. §§ 1381 *et seq.*, which became effective September 26, 1980 but which provided liability for complete or partial employer withdrawal from a multiemployer pension plan retroactive to April 29, 1980. § 1461(e)(2)(A). The constitutionality of the 1980 Act is attacked on the grounds that the withdrawal provisions, including their retroactive effective date, are arbitrary and irrational, the collection proceedings deprive an employer of an impartial prepayment hearing and the right to trial by jury, the 1980 Act generally impairs pre-existing contract rights, takes property for public use without the payment of just compensation and is void for vagueness. Threshold questions are whether the district court correctly declined to decide an alleged statutory defense which, if it prevailed, would have mooted the constitutional issue, and whether the district court should have stayed decision of the constitutional issues until arbitration was undertaken. Finally there is a question resulting from the district court's ruling on the merits as to whether it was in error in declining to award attorney's fees.

The district court ruled that it should pass on the constitutional issues and should remit to later arbitration procedures the statutory defense to plaintiff's liability. It ruled the statute constitutional in all respects, including the retroactive imposition of withdrawal liability. Although defendants thus prevailed, the district court declined to award them attorney's fees.

We affirm except with respect to attorney's fees.

I.

We begin with a brief description of the scheme of the 1980 Act. The 1980 Act was an amendment to the then-existing Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*, which had been enacted to regulate employee benefit plans so as to protect the interests of participants and their beneficiaries. ERISA had imposed no withdrawal liability on a contributor to a multiemployer plan except when the entire plan terminated within five years of the employer's withdrawal, and even then the employer's liability was limited to 30 percent of the employer's net worth.

The 1980 Act regulates employer withdrawals from multiemployer benefit plans.[1] Its basic concept is that each employer, in addition to contributions to the plan pursuant to collective bargaining agreements, owes a share of the unfunded vested liability of the plan to its beneficiaries and the employer must pay that share if he withdraws from the plan even if the plan does not terminate.[2] Although effective gener-

[1] As the brief of Republic Industries, Inc. explains, multiemployer funds predominate in industries typified by small employers, systems of shifting work sites and "portability" of employment, such as the construction, mining, entertainment and motor carrier industries. The multiemployer character of the fund permits employees to accumulate pension credits even while shifting employment from one employer to another, and protects their pension rights from being lost by the "withdrawal" of any particular employer. The multiemployer character of the fund also protects the solvency of the fund because the impact on the fund from the "withdrawal" of any particular employer is minimized; and when new entrants take the place of withdrawing employers, the pool is replenished.

[2] Unfunded vested liability, Republic asserts, can result from a number of factors. First, contributions are set by the collective bargaining process while benefits are prescribed by the fund's trustees who are independent of the employer. There is not always correlation between them so that contributions may be inadequate. Second, many funds predate ERISA and the vesting requirements of ERISA may be more stringent and increase unfunded vested liabil-

ally September 26, 1980, the 1980 Act makes withdrawal liability applicable to any employer on or after *April 29, 1980*. § 1461(e)(2)(A).

When an employer withdraws, the benefit plan's sponsor (here, the Board of Trustees of Teamsters Joint Council No. 83 of Virginia Pension Fund) determines the amount of the employer's withdrawal liability, devises a payment schedule, gives notice to the employer and demands payment. §§ 1382 and 1399. If the employer disputes either the fact or the amount of its liability, it has the right to negotiate the matter with the plan's sponsor, § 1399(b)(2)(A), and if it is unsuccessful, it (as well as the plan's sponsor) has the right to invoke arbitration. § 1401.(a) Either party to arbitration may apply to a district court "to enforce, vacate, or modify the arbitrator's award," but in any such proceeding, there is a statutory presumption that the arbitrator's findings of fact were correct, rebuttable only by a clear preponderance of the evidence. § 1401(b) and (c). Although an employer may seek arbitration and judicial review of the arbitrator's decision, it is statutorily obligated to pay the sponsor's determination of its withdrawal liability no later than sixty days after the initial demand "notwithstanding any request for review or appeal of determinations of the amount of such liability or of the [payment] schedule." § 1399(c)(2).

Factually, this case arose in this manner. Plaintiff, Republic Industries, Inc. (Republic), is the successor in interest to Johnson Motor Lines, Inc. (Johnson), an interstate motor carrier of freight.[3] Johnson continued to operate until August 8, 1980,

ity. Third, increases in benefits for employees with credit for past service for which no employer contribution was made increase unfunded vested liability. Fourth, the assets of the fund may diminish as a result of market forces, general economic conditions or imprudent investment. Fifth, actuarial assumptions on which unfunded vested liability is premised may be modified.

[3] Republic purchased all of Johnson's stock in June 1979.

but in November 1979, because of operating losses, it closed its Richmond General Commodities terminal (Hull Street terminal) and transferred some of the employees to another terminal also in Richmond but some eight miles away (Maury Street terminal).[4] Johnson, pursuant to collective bargaining agreements, had obligated itself to make periodic contributions to defendant, Teamsters Joint Council No. 83 of Virginia Pension Fund (Pension Fund), with respect to employees at the Hull Street terminal, as well as contributions to other funds with regard to employees at other terminals.[5] On August 8, 1980, Republic concluded to terminate all of Johnson's operations; Republic acquired Johnson's assets; Johnson was dissolved; and all contributions to the Pension Fund ceased.

On July 3, 1981, Pension Fund notified Johnson that its withdrawal liability would be $189,107.00. However, because § 1383(d) makes special provision for the amount and terms of payment of withdrawal liability of "employers primarily engaged in the long and short haul trucking industry" and others, Pension Fund demanded that Republic, instead of payment in full, post security for 50 percent of the amount claimed pending a determination by the Pension Benefit Guaranty Corporation (Guaranty Corporation) of whether Pension Fund's contribution base had been "substantially damaged" as a result of

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[4] There is evidence that even before the transfer employees of the terminal were used, from time to time, to perform services at the other facility.

[5] At issue in this case is Republic's asserted withdrawal liability of approximately $189,000 with respect to the employees formerly at the Richmond General Commodities terminal. Republic asserts that its combined asserted withdrawal liability to other funds for other employees exceeds $19,000,000. The other claims are in litigation before other courts but no suit has been decided on its merits by an appellate court.

withdrawal.[6] Republic protested, contesting retroactive liability and asserting that liability for employees at the Hull Street terminal closed in 1979 should have been excluded with the result that withdrawal liability would become *de minimis*. Pension Fund did not accede to this protest and Republic did not seek arbitration. A year later, Pension Fund, because it became uncertain of Republic's right to the special provisions of § 1383, demanded payment in full, stating that it had determined that Pension Fund was not a trucking industry plan.

Republic then instituted this action, seeking a declaration that the retroactive withdrawal liability provisions of the 1980 Act are unconstitutional and a permanent injunction restraining Pension Fund from collecting its withdrawal liability claim. Pension Fund was named as defendant. The district court and we permitted Guaranty Corporation to participate in the proceedings as amicus curiae.

The district court, on cross-motions for summary judgment, held that the retroactive aspect of withdrawal liability was valid and constitutional. It recognized that, with respect to withdrawal from a multiemployer pension plan, the case was one of first impression. It placed principal reliance on Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d. 947 (7 Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980), which was a case dealing with withdrawal from a single employer

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[6] Pension Benefit Guaranty Corporation is a government corporation created by 29 U.S.C. § 1302 to insure pension benefits, *inter alia*, of multiemployer benefit plans and to enforce, *inter alia*, the withdrawal liability provisions of the 1980 Act. 29 U.S.C. § 1322a. With respect to certain industries, including long and short haul trucking, the corporation may require a bond or escrow account from an employer purporting to withdraw pending a determination of whether the withdrawal has resulted in "substantial damage to the contribution base of the plan." If the determination is affirmative, the employer's obligation to pay becomes operative, but if the determination is in the negative, the bond is cancelled or the escrow refunded without further liability on the employer.

pension plan, because it thought the difference was not distinguishing. The district court concluded that it should decide the case on constitutional grounds, neither deciding it on the statutory ground that the Hull Street terminal was a separate facility from the Maury Street terminal nor requiring resort to arbitration as a condition precedent to the constitutional challenge, because it was of the view that the constitutional challenge was one that went to the very process of arbitration and that arbitration would not moot the constitutional issue. In this connection, after ruling the 1980 Act valid, the district court ruled that arbitration was still available since the pendency of the action tolled any period of limitations on seeking arbitration. Because it understood the law with regard to plaintiff's other constitutional challenges to be well settled in favor of their rejection, the district court did not discuss them. From these rulings, Republic appeals. At a later stage of the proceedings, the district court denied defendant's request for attorney's fees, and from that order defendant appeals.

II.

We consider first whether the district court correctly proceeded to a decision of the constitutional challenges. In the district court, Republic argued that its claim depended entirely upon the meaning of the term "facility" as used in § 1397(a),[7] that the Hull Street terminal was a facility which was permanently closed before April 29, 1980, and that therefore it was entitled to judgment as a matter of law. As part of the argument both there and here Republic invoked the established rule of law that cases should be decided, where possible,

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[7] The pertinent portions of the statute are:

§ 1397. Application of part in case of certain pre-1980 withdrawals; adjustment of covered plan.

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after April 28, 1980, and for the purpose of determining whether there has been a partial

on statutory grounds and unnecessary constitutional adjudications avoided. *See* United States v. Security Industrial Bank, ___ U.S. ___, 51 USLW 4007, 4009 (November 30, 1982).

The amicus Guaranty Corporation makes a related argument based upon the familiar principle of exhaustion of available remedies. It contends that the district court should not have proceeded to a constitutional adjudication until after arbitration had been initiated and concluded. *See* Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 50-51 (1938). Indeed it argues that, absent exhaustion, the district court lacked equity jurisdiction. *See* Aircraft & Diesel Equipment Corporation v. Hirsch, 331 U.S. 752, 767 (1947). Pension Fund argues, instead, that Republic has lost the right to arbitration on the statutory issue since it failed to seek arbitration within the time prescribed by § 1401(a)(i) [sic], and so the constitutional issue is properly reached. It is interesting to note that the arguments of Pension Fund and Guaranty Corporation are in conflict, because a premise of the argument of Pension Fund is that there is *no* issue for an arbitrator to decide, while a premise of the argument of Guaranty Corporation is that there *is* an arbitrable issue.

We think that the district court correctly proceeded to decide the constitutional issues without addressing Republic's statutory argument. In disagreement with Republic we think that the question of whether the Hull Street terminal was a "facility" within the meaning of § 1397(a) is, at least in part, a factual one which under the 1980 Act must be decided by

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withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable—

. . . .

(2) to work performed at a facility at which all covered operations permanently ceased before April 29, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

arbitration. As we have recited, Johnson operated two terminals in Richmond, approximately eight miles apart. The employees at the Hull Street terminal were, from time to time, loaned to the Maury Street facility; and although the Hull Street terminal was closed prior to the crucial date of retroactivity, the Maury Street terminal, to which five of the General Commodity employees were transferred and on whom Republic continued paying contributions to the Pension Fund, was not discontinued until after the crucial date of retroactivity. Pension Fund, by the assertion of Republic's liability, expressly or impliedly took the position, in dispute of that taken by Republic, that the terminal not closed until after April 28, 1980 was a "facility." It seems to us that whether the two terminals represented *a* Richmond facility or whether the surviving terminal became a covered facility after the five employees who were beneficiaries of a benefit plan were transferred to it is a nice question of fact and law.

We have no doubt that the scheme of the 1980 Act is to require such a question to be decided by an arbitrator rather than a court. Section 1401(a)(1) expressly provides that "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan [pertaining to the assessment of withdrawal liability] shall be resolved through arbitration." Section 1401(b)(2) in providing for judicial review conditions the right to review "[u]pon completion of the arbitration proceedings in favor of one of the parties. . . ." Finally our sister circuit in Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund, 693 F.2d 290, 294 (3 Cir. 1982),[8] has stated that the 1980 Act "explicitly mandates the initial resolution of disputes through arbitration. . . ."

We also reject the argument of Guaranty Corporation that the district court should have withheld its constitutional

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[8] This case is one of the proceedings in which plaintiff here is challenging its alleged withdrawal liability assessed in another jurisdiction.

pronouncement until the arbitration remedy was exhausted. This question was extensively considered in Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund, *supra*, which held that since there, as well as here, Republic mounts a facial challenge to the constitutionality of the 1980 Act and because arbitration could neither moot the constitutional issues which are raised nor develop a factual context for their easy judicial resolution, exhaustion of the remedy of arbitration will not be required as a prerequisite to the exercise of judicial determination. Similarly, in Shelter Framing Corporation v. Pension Benefit Guaranty Corporation, ___ F.2d ___ (9 Cir., May 20, 1983), where a constitutional attack on the validity of the retroactive effect of the 1980 Act was sustained and the retroactive feature held unconstitutional, the court rejected the argument of Guaranty Corporation that it should withhold deciding the constitutional issue until after arbitration. The court noted that the arbitration provisions of the 1980 Act were limited to "disputes involving a determination . . . [of] the establishment, computation and collection of withdrawal liability." Thus, they do not apply "where the constitutionality of the statute, not the establishment or amount of withdrawal liability, is at issue." *Id.* at ___ It also recognized that the expertise of an arbitrator would not go to the constitutional issue and therefore "[a]rbitration would neither develop a better record for adjudication of the constitutional issues nor eliminate the need to consider the constitutional challenge." *Id.* at ___. We agree and rest on their authority.

III.

Republic contends that the retroactive effect of the withdrawal liability provisions denies it due process of law, both by impairing pre-existing contractual rights and by violating its right to prior notice and fair warning of governmental regulation.

While it is settled that Congress may not legislate retroactively in the field of criminal law, the Constitution does

not deny it some authority to do so in order to adjust the burdens and benefits of economic life. The leading authority is Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), in which it was held that the Black Lung Benefits Act of 1972 did not deny due process by requiring coal operators to compensate former employees suffering from pneumoconiosis who terminated their work in the industry before the Act was passed. The Court prescribed as the test for validity the "rationality" of retrospective legislation, pointing out that rationality, i.e., the justification, for prospective legislation may not suffice for retrospective legislation. Specifically with regard to the Act being considered, the Court concluded that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the cost of employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers." *Id.* at 18. The Court rejected the argument that there was a fairer means of spreading the costs, saying "[i]t is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Id.* at 19. Finally the Court distinguished Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935), a case in which a provision in the Railroad Retirement Act of 1934, requiring employer-financed pensions for former employees who had been employees within the year preceding the time of enactment of the Act, was held invalid. It said that, "[a]ssuming that . . . [Alton] retains vitality", *Id.* at 19, the purpose of the Black Lung Benefits Act was to satisfy a specific need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business, rather than to "supplement a former employee's salary to meet his generalized need for funds." *Id.* at 19.

The principles of *Usery* have been applied by two courts of appeals to two provisions of ERISA which impose retroactive liability for the payment of unfunded, vested benefits upon an

employer who withdraws from a pension plan. In Nachman Corporation v. Pension Benefit Guaranty Corporation, 592 F.2d 947 (7 Cir. 1979), *aff'd on stat. grounds*, 446 U.S. 359 (1980), the Seventh Circuit ruled on the constitutionality of the provision of ERISA relating to the termination of a single employer pension fund.[9] Nachman's collective bargaining agreement permitted it to terminate its pension plan; and although the plan purported to guarantee fixed benefits for each year of service, the agreement provided that in the event of termination the fund would pay benefits only to the extent of its assets without liability on the part of Nachman for vested but unfunded benefits. Nachman terminated its plan after the enactment of ERISA and at a time when the assets of the fund could satisfy only 35 percent of accrued vested benefits. ERISA, *inter alia*, created Guaranty Corporation which guaranteed the payment of nonforfeitable benefits and which had the right to recover amounts it paid under its guaranty from the employer who sponsored the plan. Thus ERISA required Nachman to fund retroactively unfunded, vested benefits.

The Seventh Circuit sustained the constitutionality of this provision of ERISA. After reciting *Usery's* requirement of "rationality", the court said:

> Rationality must be determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem. In evaluating the nature and scope of the burden, it is appropriate to consider the reliance interests of the parties affected, . . . whether the impairment of the private interest is effected

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[9] **Although the Supreme Court affirmed the Seventh Circuit's judgment on statutory grounds, the Supreme Court's judgment has been considered by many courts to be a sub silento [sic] affirmance of the constitutional aspect of *Nachman. See, e.g.*, A-T-O, Inc. v. Pension Benefit Guaranty Corp., 634 F.2d 1013, 1024 (6 Cir. 1980); Pension Benefit Guaranty Corp. v. Ouimet Corp., 630 F.2d 4, 12 (1 Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); Peick v. Pension Benefit Guaranty Corp., 539 F. Supp. 1025 (S.D.N.Y. [sic] 1982).**

> in an area previously subjected to regulatory control, . . . the equities of imposing the legislative burdens, . . . and the inclusion of statutory provisions designed to limit and moderate the impact of the burdens.

Id. at 960 (citations omitted). With respect to these factors, the court identified the loss by workers of vested pension benefits due to plan terminations as a widespread problem of national importance. Congress was confronted with evidence that approximately 20,000 workers lost benefits each year for that reason. The court thought that the reliance of employees on their vested pension benefits outweighed the employers' reliance on a limited funding obligation; it noticed that federal tax laws had imposed some regulation on employee pension plans; and it thought it equitable for an employer who has received the full benefit of its employees' services to pay for the pension promised them. Finally, it relied on the provisions of ERISA modifying the employer's liability, *i.e.*, net worth limitations on liability, the right to insure against this contingent liability and Guaranty Corporation's authority to arrange reasonable terms for the payment of liability.

Shelter Framing Corporation v. Pension Benefit Guaranty Corporation, ____ F.2d ____ (9 Cir., May 20, 1983), dealing with the same retrospective provision of the 1980 Act which is before us in the present case, reached the opposite result. There, Shelter, G & R Roofing Company and R. A. Gray & Co., respectively, contributors to multiemployer pension plans, each withdrew from the pension fund to which it had been obligated to make payments prior to the effective date of the 1980 Act but after April 29, 1980, and each was assessed for withdrawal liability. Applying the analytical framework established by *Nachman*, the Ninth Circuit held the retroactive aspect of the 1980 Act unconstitutional. It thought that employer reliance on nonliability outweighed employee reliance on vested rights, particularly when the employers in the cases before it withdrew before enactment of the 1980 Act. With regard to employee reliance, the court reasoned that reliance was on the plan itself and not the contribution of any particular

employer. Although the court recognized that pension plans have been subject to regulation at least since 1974 when ERISA was enacted, and that the fact of prior regulation "weighs in favor of retroactive application," it concluded that the "unduly harsh degree" of impairment of the employers' reliance interests by the 1980 Act still rendered it invalid. *Id.* at p. ____. In weighing the equities, the Ninth Circuit concluded that the equities weighed against retroactive application of the 1980 Act, largely because, for employers who withdrew in the period between April 29, 1980 and September 26, 1980, the withdrawal liability "may" be disproportionate to the specific needs of the pension trust funds. Finally in discussing moderating provisions,[10] the Ninth Circuit found them largely ineffective. The difference in the efficacy of the moderating provisions contained in ERISA and those in the 1980 Act was the principal ground on which *Nachman* was distinguished.[11]

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[10] The moderating provisions with regard to withdrawal liability noticed by the Ninth Circuit may be summarized as follows: a mandatory "de minimis" exemption excuses all liability under $50,000.00, § 1389(a); the trustees of the pension plan may grant a higher exemption, § 1389(b); withdrawal liability is payable over a period of time, § 1399(c)(1); liability is limited to the first twenty annual payments if more than twenty years is needed to amortize the employer's liability, § 1399(c)(1)(B); liability is reduced if the employer withdraws because it liquidates or dissolves its business, § 1405. As we shall show, we think that there are others.

[11] Among district courts, the numerical weight of authority supports the constitutionality of the 1980 Act. *See* Pacific Iron & Metal Co. v. Western Conf. of Teamsters Pension Trust Fund, 553 F. Supp. 523 (W.D. Wash. 1982); Coronet Dodge, Inc. v. Speckmann, 553 F. Supp. 518 (E.D. Mo. 1982); Fur Manufacturing Industry Retirement Fund v. Laza-Wigotsky, Inc., [sic] 550 F. Supp. 35 (S.D.N.Y. 1982); R. A. Gray & Co. v. Oregon-Washington Carpenters Employers Pension Trust Fund, 549 F. Supp. 531 (D. Or. 1982), *rev'd*, ____ F.2d ____ (9 Cir. 1983); Textile Worker Pension Fund v. Standard Dye Co., 549 F. Supp. 404 (S.D.N.Y. 1982); Peick v. PBGC, 539 F. Supp. 1025 (N.D. Ill. 1982) There are also numerous unreported decisions

Applying the *Nachman* frame of analysis, we, with due respect to the views of the Ninth Circuit, conclude that the retrospective withdrawal liability feature of the 1980 Act is constitutional.

The problem that the 1980 Act addressed was how to protect the financial stability of multiemployer pension funds more particularly described in Peick v. Pension Benefit Guaranty Corporation, 539 F. Supp. 1025, 1029-34 (S.D.N.Y. 1982). Briefly stated, the genesis of the 1980 Act was a report of Guaranty Corporation which described its potential liability under the proposals then pending to make it a mandatory insurer of multiemployer pension funds. The report not only confirmed the pressing need for such insurance, it called attention to the incentive that such insurance would provide either to terminate a plan or discourage employer joinder in a multiemployer plan. Thus Congress was well aware that in its commendable effort to make certain that employees ultimately realize their vested benefits it was necessary to take measures to deal with withdrawal liability lest it exacerbate the problems of financially weak plans and encourage withdrawals from and terminations of plans in financial distress. The problem was met by imposing retroactive withdrawal liability. Significantly the date of retroactivity was advanced from February 27, 1979, as prescribed in the bill as introduced, to April 29, 1980, as prescribed in the bill as enacted. *See, Peick*, 539 F. Supp. at 1053.

We think that the Congressional response to the problem was a rational one. It is not our function to say that it was the

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to the same effect holding MPPAA constitutional. But there are cases holding the 1980 Act unconstitutional. *See* Shelter Framing Corp. v. Carpenters Pension Trust, 543 F. Supp. 1234 (C.D. Cal. 1982), *aff'd*, ____ F.2d ____ (9 Cir. 1983); Republic Industries, Inc. v. New England Teamsters and Trucking Pension Fund, No. 81-2551-S (D. Mass. Aug. 3, 1983); Sibley, Lindsey & Carr Co. v. Bakery, Confectionary & Tobacco Worker's Int'l Union, [sic] C-82-555T (W.D.N.Y. Mar. 16, 1983).

best one. We have no doubt of the heavy weight to be given to employees' reliance on ultimate realization of their vested benefits. Conversely, Republic's reliance on its unqualified right to withdraw from a multiemployer pension plan is not as weighty. As the legislative history of the 1980 Act shows, by the effective date of the Act, April 29, 1980, two House Committees had reported out bills imposing withdrawal liability retroactively to withdrawals occurring after February 27, 1979.[12] By the time that Republic closed its facility on August 8, 1980, the House had unanimously passed the bill, and the Senate had passed a substantially similar bill which advanced the effective date to April 29, 1980. Thus Republic had fair notice of its potential liability. In this regard retroactive legislation was held valid in United States v. Darusmont, 449 U.S. 292, 299 (1981) (per curiam), and United States v. Hudson, 299 U.S. 498 (1937), where pre-enactment events gave an affected party fair notice of the act. Republic suggests that these cases are *sui generis*, but it offers no persuasive reasoning why this is so or why they are inapplicable here.

We agree with the Ninth Circuit for the reasons assigned by it that the *Nachman* factor of prior regulation is fully satisfied. Additionally we would add—and perhaps this goes as much to Republic's reliance on nonliability for withdrawal—that since the enactment of ERISA, termination of single employer pension funds has been fully regulated and regulation of withdrawal from multiemployer pension funds was only postponed because of Congressional caution about the best way to approach the problem. *See Peick*, 539 F. Supp. at 1030-31.

The balance of equities of the parties, to our minds, weighs heavily in favor of the employees. We can add little to the

[12] The House Education and Labor Committee reported on April 3, 1980. H.R. Rep. No. 869(I), 96th Cong. 2d Sess., reprinted in [1980] U.S. Code Cong. & Ad. News 2918, 2940-2954. The House Ways and Means Committee reported on April 23, 1980. H.R. No. 869(II), 96th Cong. 2d Sess., reprinted in [1980] U.S. Code and Ad. News. 2992, 3005-3020.

discussion of the equities contained in *Peick*, 539 F. Supp. at 1046-52. We say only that Congress was met with the need to ensure financial stability of multiemployer pension plans when withdrawals occurred, as well as to create disincentives for employers to abandon such plans. Confronted with the choice of who should bear the economic burden of unfunded pension liability left by withdrawing employers, Congress did not in our view act inequitably in requiring that employers who received the full benefit of their employees' services should bear the cost rather than the employees who provided their services on the actual or implied promise that they would ultimately enjoy their vested, accrued pension benefits.

In finding the retroactive imposition of withdrawal liability to be unnecessary to protect a worker's right to vested benefits, the Ninth Circuit placed great emphasis on the ability of the employers who remain in a plan to fund those payments. Therein it found a basis to distinguish the single-employer plan provisions at issue in *Nachman*. However, Congress expressly confronted this issue and concluded that while shifting liability to the remaining employers might preserve workers' benefits it would also create an incentive for those employers to withdraw to avoid being saddled with the liability. As the district court noted, in *Peick*, it was the fear of such a wave of opportunistic withdrawals prior to the effective date of the 1980 Act which lead Congress to impose liability retroactively. *Id.* at 1055. This legislative judgment is, in our view, not an irrational one.

Congress did ameliorate the substantial impact of withdrawal liability as recognized by the Ninth Circuit. *See* n.10, *supra*. In addition, as moderating factors, the 1980 Act ensures that an employer's liability will be proportionate to its past annual contributions. § 1399(c)(l)(C). It provides that withdrawal does not generally occur when an employer ceases covered operations or ceases to contribute as a result of a bona fide sale of assets to an unrelated party which assumes the obligation to continue contributions. § 1384. Nor does an employer's change in corporate structure or change to an unincorporated form of

business enterprise constitute a withdrawal if the successor continues to contribute to the plan. § 1398(1). A withdrawal does not occur solely because an employer suspends contributions during a labor dispute involving its employees. § 1398(2). Finally, with respect to certain industries, an employer is excused from withdrawal liability if the plan's contribution base will not be harmed by the withdrawal. § 1383.

In summary, therefore, we think that the *Nachman* analysis is the proper one to apply; and when we apply it, we are led to conclude that the provisions of the 1980 Act for retroactive withdrawal liability are valid and constitutional.

IV.

We turn now to Republic's contentions that the 1980 Act is unconstitutional for other reasons. The grounds asserted are that (1) the 1980 Act deprives Republic of its right to an impartial prepayment hearing, (2) it abrogates the right to trial by jury, (3) it impairs pre-existing contract rights, (4) it takes property for public use without payment of just compensation, and (5) it is void for vagueness. We consider them seriatim.

A. Alleged Denial Of Procedural Due Process.

Republic's argument is that compulsory arbitration is invalid; but even if it is not, the dispute resolution mechanism of the 1980 Act is constitutionally defective because it is not fair and impartial, because the presumptions of correctness of the arbitrator's decision and the statutory burden of proof to overcome it convert judicial review into *pro forma* review rather than a *de novo* determination, and because payment of withdrawal liability is required pending arbitration and judicial review, all to the end that Republic is denied procedural due process of law.

We begin our discussion with recognition that a determination of whether due process is satisfied requires us to balance the government's interest in utilizing the challenged proce-

dures, the risk of error inherent in those procedures and the private interests that will be affected by the challenged procedures. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). We are mindful that "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

First, we think it too late in the day to argue that compulsory arbitration, per se, denies due process of law. The cases holding unconstitutional the delegation of adjudicating authority to private parties have all done so on the ground that the parties to whom the delegation is made lack the impartiality and objectivity which due process requires. *See* Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Eubank v. City of Richmond, 226 U.S. 137 (1912). Delegation of adjudicatory authority to an impartial arbitrator does not suffer from this infirmity. Indeed the Supreme Court, without discussion of the constitutional implications, has frequently enforced the provisions of the Railway Labor Act requiring binding arbitration of certain railroad labor disputes. *See* Andrews v. Louisville & N.R.R., 406 U.S. 320, 322 (1972), and cases cited therein. Congress may require arbitration so long as fair procedures are provided and ultimate judicial review is available. Thus we proceed to a consideration of Republic's assertions of unfairness in the dispute resolution mechanism.

We do not think that Republic has shown there is institutional bias on the part of the trustees of Guaranty Corporation [sic] who make the initial determination of the amount of withdrawal liability. Collectively, there are an equal number of trustees chosen by participating unions and participating employers. 29 U.S.C. § 186(c)(5)(B). But we reject the argument that they have an inherent bias in making overly liberal assessments of withdrawal liability so to favor employees and lessen the financial burden on employers who remain as participants in the plan. They are fiduciaries and are required to act as such. That they are selected by entities which have an interest in protecting the fund which they administer does not per se deny due process. Friedman v. Rogers, 440

U.S. 1, 17-18 (1979); First Jersey Securities v. Bergen, 605 F.2d 690 (3 Cir. 1979); Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2 Cir. 1974). As was pointed out in *Lopez*, to forbid tribunals composed of individuals drawn from organizations interested in the matter being regulated on the ground of such interest would deny the tribunal valuable, and perhaps otherwise unavailable, expertise.[13]

Moreover, the trustees do not act with unbridled discretion. By statute, the method of computing the unfunded vested liability of a plan is prescribed, § 1391, and it is phrased in such language that an actuary must be employed. In addition, Guaranty Corporation may prescribe actuarial assumptions upon which unfunded vested benefits are determined as the

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[13] The allegations of trustee bias are little more than "generalized assumptions of possible interest" unsupported by any evidence other than a description of the institutional role of the trustees. As the Supreme Court noted in Schweiker v. McClure, 456 U.S. 188, 196 n.10 (1982), "(s)uch assertions require substantiation before they can provide a foundation for invalidating an Act of Congress."

This case is unlike Ward v. Village of Monroeville, 409 U.S. 57 (1972), where the Supreme Court held it violative of due process for a mayor of the village to adjudicate traffic offenses and administer fines since those fines were a major source of income to his community. The "possible temptation" was greater in *Ward*, 409 U.S. at 60, since the fines represented over one-third of the village's income and were apparently irreplaceable. Here liability assessments are only a small portion of the Fund's total income. Second, employment of the mayor as judge was not claimed to serve any particular interest in *Ward*. Here, by utilizing the trustees, informed decisionmaking on fairly specialized issues is ensured. Finally, the role played by the mayor in *Ward* was purely adjudicative in nature. Here the trustees play a mixed role since much, but admittedly not all, of their task is ministerial in nature. For example, in the allocation of a withdrawing employer's proportionate share of the plan's unfunded vested benefit liability the trustees' task is limited to mechanically applying the plan's rule of apportionment to the actuary's determination of its total liability.

first step in determining an employer's withdrawal liability. § 1393.

In making factual determinations such as, for example, whether Republic's Maury Street terminal became a "facility" after the Hull Street terminal was closed, as well as the amount of an employer's withdrawal liability, a decision of the trustees is subject to arbitration, and the decision of the arbitrator, to judicial review. We reject Republic's argument that such review is essentially meaningless. It is true that the 1980 Act makes the trustees' decisions presumptively correct, § 1401(a)(3)(A), and provides that the decision of the arbitrator is also presumptively correct and may be rebutted only by a clear preponderance of the evidence. § 1401(c). Read together, however, these provisions do little more than allocate the burden of proof to the challenger and direct that issues which are close be resolved in favor of the nonjudicial dispute resolver. In this we perceive no evident unfairness.[14]

We do not think, as Republic argues, that an employer cannot obtain effective judicial review of an arbitrator's legal rulings. It is true that § 1401(b)(3) provides that any arbitration proceedings shall "to the extent consistent with [the 1980 Act]" be conducted subject to the same limitations, carried out with the same powers, and enforced in United States Courts" as arbitration proceedings carried out under 9 U.S.C. §§ 1 *et. seq.*, and that 9 U.S.C. § 10 prohibits judicial review of legal or factual disputes voluntarily submitted to an arbitrator. The clear authorization of § 1401(b)(2) for judicial review "to enforce, vacate, or modify the arbitrator's award" gives a right to review an arbitrator's legal rulings. Since 9 U.S.C. § 10 is not consistent with § 1401(b)(2), the latter prevails.

Finally, we consider whether the provisions of the 1980 Act with respect to payment of withdrawal liability pending review by the trustees of the plan or pending arbitration deny due

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[14] The amicus brief of Guaranty Corporation cites several cases in which an employer has prevailed in arbitration.

process of law.[15] There is an ambiguity in the 1980 Act as to how much Republic must pay pending reconsideration arising out of the meaning of § 1401(d).[16] Depending upon how the 1980 Act is read, Republic may be required to make installment payments as they come due in order to avoid a default, which would have the effect of accelerating its total liability, or it may not be required to pay anything while it exercises its right to review or arbitration. We need not resolve this issue in this appeal, because even if we assume that Republic must make periodic payments as they become due and owing, it would not be denied due process. In all but the most prolonged proceedings, we cannot perceive how payment of the periodic installments as they become due and owing could constitute a crushing

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[15] 29 U.S.C. § 1399(c)(2) requires that payments be commenced within sixty days after the date of demand by the plan sponsor. 29 U.S.C. § 1399(c)(5)(A) permits the plan sponsor to treat nonpayment as default if it is not cured within sixty days after it notifies the employer of its failure to pay. The amount of the annual payment is calculated under § 1399(c)(1)(C): it is the product of the employer's highest contribution rate in the last ten years and the average number of contribution base units for the three consecutive years during that period in which the average is greatest. Payments are made over the period necessary to amortize fully the liability, but not to exceed twenty years. Here a payment period of thirty-eight months is anticipated.

[16] Section 1401(d) provides:

> Payments shall be made by an employer in accordance with the determinations made under this part [29 U.S.C. §§ 1391 et seq.] until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 515).

The first sentence plainly requires that installment payments be made pending the arbitrator's final decision. The second sentence,

economic burden on Republic.[17] Indeed, an employer's annual liability is calculated so that it will bear a rough relation to its past contributions, § 1399(c)(1)(C). Since Republic has the right to contest the assessment and since it will receive credit for any overpayment arising out of the decision of the arbitrator, § 1401(d), or as modified by a court, § 1401(b)(2), we cannot say that Congress has denied due process in striking a balance between the competing interests of the pension fund and the employer. *See* Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). Finberg v. Sullivan, 634 F.2d 50 (3 Cir. 1980) (in banc).

B. Alleged Denial Of Right To Jury Trial.

We do not think that Republic has been denied a right to a jury trial. Such a right is only with respect to suits which existed at common law, Atlas Roofing Co. v. OSHA, 430 U.S. 442, 458 (1977); this is not such a case. More is involved than a dispute between Republic and the Fund. Ultimately, liability

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however, apparently contemplates that it is the failure to render payments upon that final decision which constitutes default. That installment payments must be made pending arbitration is further suggested by § 1399(c)(2), which states:

> Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

However, apparently to the contrary is § 1401(b)(1) which implies that requested sums are not due while arbitration is pending. It states:

> If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded under section [1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor.

[17] Republic's liability has been assessed at $189,107.00, payable in equal monthly installments over thirty-eight months. A monthly installment is thus $5,651.00.

for unfunded vested rights to benefits will fall on Guaranty Corporation, a public body representing the public interest. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), makes it clear that Congress may constitutionally enact a statutory remedy, unknown at common law, vesting factfinding in an administrative agency or others without the need for a jury trial.

C. Alleged Impairment Of Contract Rights.

Because the 1980 Act would impose on Republic an obligation to pay for vested, unfunded benefits when it withdrew from a multiemployer pension plan, notwithstanding that its collective bargaining contract imposed no such liability, Republic argues that its vested contractual rights have been unconstitutionally impaired. Principal reliance is put on Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330 (1935) and Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

Usery v. Turner Elkhorn Mining co., *supra*, answers this contention. There, it was said, that if *Alton* retains vitality it is distinguishable because in *Alton* the purpose of the legislation was to supplement a former employee's salary, while in *Usery* the statute was to provide compensation for injuries sustained during employment. Similarly in the instant case, the object of the 1980 Act is to fund benefits which accrued and vested during the employees' period of employment. Like the district court, we also subscribe to the views expressed in Nachman Corp. v. Pension Benefit Guaranty Corporation, 592 F.2d at 962. We conclude that this contention is lacking in merit.

D. Alleged Taking Of Property.

While it is questionable if Republic may argue here that its property has been "taken" without "just compensation" as the Fifth Amendment requires because it is not clear if this issue was raised in the district court, the argument is foreclosed by Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). There it was recognized that government regulation

which shifts the benefits and burdens of economic life to promote the common good is not a "taking" for which compensation must be provided.

E. Alleged Unconstitutional Vagueness.

Republic contends that there is unconstitutional vagueness in the 1980 Act in two respects. First, it faults § 1383(d)(2), the so-called "trucking industry" exemption, which permits a member of that industry to avoid payment of withdrawal liability by posting a security bond pending a determination if the plan has suffered "substantial damage" by that employer's withdrawal. The exemption is extended to plans where "*substantially all* of the contributions *under the plan* are made by *employers primarily engaged* in the long and short haul trucking business, etc."[18] Its argument is that "substantially all" is undefined, as is "employers" in those instances where a parent company has a wholly-owned operating subsidiary.

Second, Republic excepts to the language of § 1393(a) giving Guaranty Corporation the authority to prescribe "actuarial assumptions" to be used for computing employer withdrawal liability at least where the plan itself does not prescribe the actuarial assumptions to be made. Although § 1393(a) does specify that the actuarial assumptions to be prescribed by Guaranty Corporation must be "reasonable", § 1393(a)(1), Republic argues that the language is so vague and inexact that the plan's trustees have unlimited and unbridled discretion to fix withdrawal liability.

We do not think that the language of the 1980 Act is impermissibly vague in either respect. The 1980 Act is a form of economic regulation and it does not impinge upon conduct which is constitutionally protected, such as the exercise of free speech. "[E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow [then regulation reaching protected conduct], and because busi-

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[18] Emphasis is added to the words on which Republic relies.

nesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning by its own inquiry, or by resort to administrative process," Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982). Moreover, where the statute does not regulate protected conduct, it may not be set aside as unconstitutionally vague unless it is "demonstrate[d] that the law is impermissibly vague in all of its applications." *Id.* at 497.

Thus the fact that the word "substantial" and the term "employers primarily engaged" in certain activities may be imprecise in certain fact situations does not make them impermissibly vague since they are quite clear in the majority of fact situations to which they apply. By and large their meaning may be discerned in most cases in which they are in issue both from the language employed and the legislative history of the 1980 Act.[19] Moreover there is authority that "substantial" is a term not so vague as to be invalid. *See* Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 48-49 (1966). Similarly, we do not think that the phrase "reasonable actuarial assumptions" is so lacking in meaning as to be invalid.

V.

After the district court sustained the constitutionality of the 1980 Act, it entered an order remitting the issue of whether the Hull Street terminal was a "facility at which all covered operations permanently ceased before April 29, 1980" to arbitration, adjudging that Republic had sixty days from the date of the order to initiate arbitration.

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[19] As pointed out in Peick v. Pension Benefit Guaranty Corporation, 539 F. Supp. at 1060-61, the legislative history of the 1980 Act indicates that Congress intended the trucking industry exemption to apply to plans in which at least 85 percent of the contributors were employers contained in the trucking industry.

The pension plan defendants challenge the correctness of this ruling. They argue that under § 1401(a)(1)(B), Republic had 120 days from July 9, 1980, [sic] the date of notice of its withdrawal liability, to request arbitration and that failing to do so, its right to request arbitration is barred.

This suit was filed October 5, 1980 [sic]. In agreement with the district court, we think that the filing of the suit tolled the period of limitations set forth in § 1401(a)(1)(B). Statutory time frames may be tolled where equitable considerations justify their suspension. *See* Burnett v. New York Cent. R. Co., 380 U.S. 424, 428 (1965). We think it equitable that when Republic has made a not frivolous challenge to the constitutionality of the arbitration procedures, the validity of which has not heretofore been definitively decided, the pendency of the litigation should toll the running of the period prescribed in § 1401(a)(1)(B).

VI.

Finally, we consider the cross appeal by Pension Plan from the district court's denial of its motion for attorney's fees under § 1451(e). After judgment was entered in its favor in Republic's action challenging the constitutionality of the 1980 Act, Pension Plan moved for attorney's fees under § 1451(e). That section states: "(i)n any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action to the prevailing party." The district court denied the motion, reasoning that Republic's constitutional challenge to the 1980 Act, and therefore Pension Fund's defense of that challenge, was not an action under § 1451. The Ninth Circuit has since held otherwise, granting attorney's fees upon a successful challenge to the constitutionality of the Act. *Shelter Framing Corp.*, ____ F.2d at ____. We agree with its conclusion that a constitutional challenge to the imposition of withdrawal liability is brought under § 1451 for § 1451(a) broadly defines the range of actions which may be brought thereunder as including any action brought by

a person "adversely affected by the act . . . of any party under this subtitle with respect to a multiemployer plan" to seek legal or equitable relief.

Thus, we reverse the district court's denial of attorney's fees and remand the claim for fees to it so that it may exercise its discretion as to whether to grant fees under § 1451(e).

AFFIRMED IN PART;
REVERSED AND REMANDED IN PART.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

September 9, 1983

TO: Louis T. Urbanczyk, Esq. Lester M. Bridgeman, Esq.
Paul J. Ondrasik, Jr., Esq. J. Stephen Caflisch, Esq.
Antonia B. Ianniello, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 83-1054, 83-1109 830119, 83-1196 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time A petition may be filed within 14 days after judgment. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.
3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

WILLIAM K. SLATE, II
CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 82-0919-A

REPUBLIC INDUSTRIES, INC.,

Plaintiff,

v.

TEAMSTERS JOINT COUNCIL NO. 83
OF VIRGINIA PENSION FUND,

Defendant.

MEMORANDUM OPINION

The issue before the court is the constitutionality of the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1381, *et seq.* The plaintiff was a participating employer in a pension fund established pursuant to § 302 of the Labor Management Relations Act, 29 U.S.C. § 186, and within the meaning of 29 U.S.C. § 1002(2). Pursuant to the MPPAA, the defendant has imposed a withdrawal liability of $189,107.00 on the plaintiff as the successor in interest to Johnson Motor Lines, Inc. (Johnson), after Johnson, on or about August 8, 1980, ceased all operations for which it was obligated to make contributions to the pension fund on behalf of its employees.

The plaintiff has brought this action against the Teamsters Joint Council No. 83 of Virginia Pension Fund (Pension Fund) seeking a declaration that the withdrawal liability provisions of MPPAA are unconstitutional, an injunction against their enforcement against the plaintiff, and restitution of all payments made prior to entry of judgment. The defendant has answered and counterclaimed for a judgment against the plaintiff for the amount of the latter's delinquent payments on the imposed withdrawal liability and attorney's fees.

After the court denied the plaintiff's application for a preliminary injunction on November 12, 1982, the parties agreed that there were no material facts in dispute and the issues in the case were appropriate for resolution on cross-motions for summary judgment. Accordingly there was established a schedule for briefs in support of such motions, which were subsequently filed, and oral argument was presented to the court on December 17, 1982. The court reserved judgment on the motions to enable it to consider the briefs and attached exhibits, in light of the Stipulated Facts filed on December 8, 1982. That has now been accomplished.

While it makes its attack on the statute on numerous other grounds,[1] the focus of plaintiff's attack is the retroactive application of the statute, in that the MPPAA-created liability would reach the plaintiff, although the plaintiff terminated its business activities on August 8, 1980, and the MPPAA was not enacted until September 26, 1980. The court will also focus on that aspect of the attack, since the remaining issues have been adequately and persuasively addressed by other courts. *Republic Industries* v. *Central Pa. Teamsters Pension Fund*, 534 F. Supp. 1340, *rev'd*, No. 82-1251 (3rd Cir., Nov. 19, 1982); *Shelter Framing Corp.* v. *Carpenters Pension Trust for Southern California*, 543 F. Supp. 1234 (C.D. Calif. 1982); *Victor Construction Co.* v. *Construction Laborer's Pension Trust for California*, No. 81-5144(GX) (C.D. Calif., June 28, 1982); *Fur Mfg. Industry Retirement Fund* v. *Lazar-Wisotzky*, 3 EBC 1977 (S.D.N.Y., Aug. 23, 1982); *S & M Paving Inc.* v. *Construction Laborers Pension Trust Fund of Southern Calif.*, 539 F. Supp. 867 (C.D. Calif. 1982).

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[1] Denial of due process because an employer is deprived of its money pending impartial adujudication of the validity of the imposed liability; vagueness; denial of access to the courts because of the compulsory arbitration requirement; impairment of contractual rights; and denial of a jury trial.

Some of the foregoing cases have discussed the retroactivity issue. Most of them have upheld the constitutionality of the statute against a challenge on this ground. The court finds particularly persuasive the discussion on retroactivity in *S & M Paving* v. *Construction Laborers Pension Trust, supra; Textile Workers Pension Fund* v. *Standard Dye Co.*, 3 EBC 2129 (S.D.N.Y. Oct. 21, 1982); and *Peick* v. *Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982), although in the first of these the court found that MPPAA was not retroactive as to those plaintiffs. The court is not persuaded by the only two court decisions which have held to the contrary, namely, *Shelter Framing Corp.* v. *Carpenters Pension Trust, supra;* and *Grano Steel Corp.* v. *Shopmen's Ironworkers Pension Plan of Southern Calif.*, No. 81-5862(JRX) (C.D. Calif. June 7, 1982). *See also, Baldwin* v. *Shopmen's Ironworkers Pension Trust*, 3 EBC 1713 (C.D. Calif. 1982) (plaintiff granted a preliminary injunction because he showed a very strong likelihood of success on the merits on a determinative constitutional issue).

Much has been and will be written concerning the constitutionality of the retroactivity of MPPAA. There is no need to burden the reader with merely a repetition of rulings the court has found persuasive. Suffice it to say that the court agrees with the analysis of *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980). The court recognizes that the Seventh Circuit's decision dealt with a single employer as opposed to a multi-employer situation - a difference that is not distinguishing. Whether the retroactive provisions of MPPAA are analyzed under the due process standards enunciated in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1976, or the Contract Clause standards of *Allied Structural Co.* v. *Spannaus*, 438 U.S. 234 (1975),[2] they pass constitutional muster.

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[2] The Contract Clause, of course, by its terms proscribes only state legislation; however, Contract Clause analysis may also be relevant to congressional enactments. *Id.* at p. 262, n. 9.

The defendant's motion for summary judgment declaring the MPPAA constitutional will be granted.

Relief

Because it perceived plaintiff's attack on MPPAA as facial in nature, attacking the entire framework of the MPPAA's withdrawal liability provisions, including the provision for arbitration, the court on November 12, 1982, rejected, at plaintiff's urging, the defendant's motion to dismiss which was grounded on the plaintiff's failure to submit to arbitration prior to filing this action. Comfort in that ruling has since been received in the form of *Republic Industries, Inc.* v. *Central Pa. Teamsters Pension Fund*, No. 82-1251 (3rd Cir. Nov. 19, 1982). In its summary judgment papers, however, now the plaintiff, supported by amicus,[3] suggests an alternative non-constitutional basis upon which to resolve the action. In this regard it is plaintiff's contention that it did not operate a "facility" within the meaning of 29 U.S.C. § 1397(a) because Johnson's Hull Street terminal was a "facility" at which all covered operations permanently closed before April 29, 1980.[4] Such a determination would, according to the plaintiff, reduce its covered operations to a *de minimis* status under 29 U.S.C.

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[3] With the court's permission, the Pension Benefit Guaranty Corporation filed an amicus curiae brief in this matter.

[4] § 1397(a) states that:

> "(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after April 28, 1980 . . . ., the amount of contributions, and the number of contribution base units, of such employer properly allocable—
>
> (1) . . . .
>
> (2) to work performed at a facility at which all covered operations permanently ceased before April 19, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account."

§ 1389(a) with a resulting elimination of any statutory withdrawal liability.

Attractive as may be the invitation to resolve both the complaint and counterclaim on a statutory non-constitutional basis, the court must reject it. In the court's view, whether the Hull Street terminal is a facility where all covered operations ceased prior to April 29, 1980, resulting in no withdrawal liability, is an arbitrable issue under 29 U.S.C. § 1401.[5] The court is unwilling, even if empowered to do so, which is doubtful, to bypass MPPAA's considered preference of this manner of dispute resolution. Instead of merely holding that the issue is arbitrable, however, the court will remand that aspect of the case to arbitration in accordance with 29 U.S.C. § 1401 and the arbitration procedures promulgated by the Pension Benefit Guaranty Corporation under § 1401. *See Republic Industries, Inc.* v. *Central Pa. Teamsters Pension Fund*, 534 F. Supp. 1340, 1348 n. 1 (E.D. Pa. 1982) (as an interim measure the PBGC has adopted the rules of the American Arbitration Association to control arbitration procedures); *Witte Transportation Co.* v. *Central States Pension Fund*, 2 EBC 2160, 2161 (D. Minn. 1981).

The defendant has asserted, for the first time, in its motion for summary judgment on its counterclaim that arbitration is no longer available to plaintiff because of plaintiff's failure to request arbitration in a timely manner under § 1401(a). The defendant had previously been willing to consent to arbitration as provided in § 1401(a)(1)(B) which allows joint initiation of arbitration within 180 days of the defendant's demand for

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[5] Section 1401 provides, in part:

"(a)(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration . . . .

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation."

payment pursuant to § 1399(b)(1). Defendant's change of heart at this stage of the proceedings raises a serious question whether the defendant is estopped from changing its position on this issue when it had earlier stated its willingness to go to arbitration. However, the court need not address this issue since it concludes that the initiation of this lawsuit tolled the time limits for requesting arbitration. *Terson Company, Inc. v. Pension Benefit Guaranty Corp.*, No. 81 C 4176 (N.D. Ill. April 22, 1982), *slip op.* at 6. Therefore, plaintiff will be allowed 60 days from the date of this opinion to initiate arbitration proceedings.

Counterclaim

The MPPAA expressly provides that payments of the withdrawal liability must be made in accordance with the schedule until the arbitrator issues a final decision. The amount of the liability imposed as well as the schedule are now matters of record, but the plaintiff has made the payments required by the schedule. While it has failed to make them on time, it has so far always made them in time to "cure" the failure and prevent a default under 29 U.S.C. § 1399(c)(5). Under these circumstances, summary judgment on the counterclaim in favor of the defendant is inappropriate. Given the court's ruling on the yet-to-be-arbitrated issue discussed before, summary judgment on the counterclaim in favor of the plaintiff is also inappropriate. The counterclaim will therefore be dismissed without prejudice.

/s/ ALBERT V. BRYAN
United States District Judge

Alexandria, Virginia
December 29th, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 82-0919-A

REPUBLIC INDUSTRIES, INC.,

Plaintiff,

v.

TEAMSTERS JOINT COUNCIL NO. 83
OF VIRGINIA PENSION FUND,

Defendant.

ORDER

For the reasons set forth in the Memorandum Opinion this day filed, and based on the Stipulated Facts attached as Appendix A, all of which the court adopts as its findings of fact and conclusion of law, it is hereby ADJUDGED and ORDERED that:

1. The withdrawal liability provisions of the Multiemployer Pension Plan Amendment Act of 1980, 29 U.S.C. § 1381, *et seq.*, are constitutional.

2. The issues whether the Hull Street terminal was a "facility at which all covered operations permanently ceased before April 29, 1980," 29 U.S.C. § 1397(a) and if it was, whether, under 29 U.S.C. § 1389(a), this results in their being no statutory withdrawal liability against Republic Industries, Inc., as successor to Johnson Motor Lines, are remanded to arbitration in accordance with 29 U.S.C. § 1401. Plaintiff has 60 days from the date of this order to initiate the arbitration process.

3. The counterclaim is dismissed without prejudice.

/s/ ALBERT V. BRYAN
United States District Judge

Alexandria, Virginia
December 29th, 1982

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 82-0919-A

REPUBLIC INDUSTRIES, INC.,

Plaintiff,

v.

TEAMSTERS JOINT COUNCIL NO. 83
OF VIRGINIA PENSION FUND,

Defendant.

STIPULATED FACTS

Plaintiff, Republic Industries, Inc. ("Republic") and defendant, Teamsters Joint Council No. 83 of Virginia Pension Fund ("Pension Fund" or "Fund"), through their undersigned counsel, hereby stipulate and agree that the following facts are to be accepted as true for purposes of the parties' cross-motions for summary judgment filed in this case pursuant to Rule 56, Fed. R. Civ. P., and for no other purpose; and without concession by either party that any statement set out herein is material to any issue in this case. The parties further reserve the right to supplement these stipulated facts prior to December 14, 1982, the date on which the responses to the cross-motions for summary judgment are due.

1. The Pension Fund is an employee pension benefit plan within the meaning of Section 3(2) of the Employees Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(2), and a multiemployer plan within the meaning of ERISA Section 3(37), 29 U.S.C. § 1002(37), and § 4001(a)(3) of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1301(a)(3).

2. The Pension Fund was established in 1957 pursuant to Section 302 of the Labor Management Relations Act, 28 U.S.C. § 186, by an Agreement and Declaration of Trust between various local unions located in the Commonwealth of Virginia that are affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters") and various employers having collective bargaining agreements with such local unions. The Agreement and Declaration of Trust governing the Pension Fund was restated and reaffirmed in its entirety, effective June 10, 1975. A true and correct copy of the Restatement and Reaffirmation of Agreement and Declaration of Trust is attached as Exhibit A to the Affidavit of Joseph Gross filed with the Court on October 22, 1982.

3. The Pension Fund was created and exists for the purpose of providing pension benefits to its participants and beneficiaries.

4. The Pension Fund is administered by a four-member Board of Trustees, two members of which are appointed by participating employers through their employer associations and two members of which are appointed by participating unions.

5. The Trustees constitute fiduciaries to the Pension Fund under ERISA Section 3(21), 29 U.S.C. § 1002(21). They also constitute the plan sponsor of such Fund under ERISA Section 3(16)(B)(iii), 29 U.S.C. § 1002(3)(B)(iii), and MPPAA Section 4001(a)(10)(A), 29 U.S.C. § 1301(a)(10)(A).

6. Under the terms of the governing trust agreement, the Trustees of the Pension Fund are authorized to establish a written plan of pension benefits ("pension plan") which specifies the circumstances under which benefits shall be paid to participants and beneficiaries in the Pension Plan. Pursuant to such authority, the Trustees have established such pension plans from time to time.

7. The Pension Fund and the pension plan offered thereunder are funded by contributions from participating employers. Employees themselves make no contributions.

8. An employer's rate of contribution to the Pension Fund is established in the collective bargaining process between it and participating Teamsters Unions and is set forth in the collective bargaining agreements entered into by those entities.

9. Plaintiff Republic is a corporation organized and existing under the laws of the State of Delaware, having its principal office in Kansas City, Missouri. Republic is the successor in interest to Johnson Motor Lines, Inc. ("Johnson"), and, as such, is responsible for Johnson's obligations, including Johnson's obligations, if any, to the Pension Fund under the MPPAA.

10. Johnson was a corporation organized and existing under the laws of the State of North Carolina, having its principal office in Charlotte, North Carolina. Johnson was a wholly-owned subsidiary of Republic from June 14, 1979, until the time of Johnson's liquidation and dissolution in August, 1981.

11. Up to and including August 8, 1980, Johnson was an interstate motor carrier of freight, operating in various states in the eastern and southeastern parts of the United States pursuant to certificates of public convenience and necessity granted by the Interstate Commerce Commission.

12. As of August 8, 1980, Johnson was a party to the following collective bargaining agreements with respect to Johnson's Richmond, Virginia employees:

(a) The National Master Freight Agreement and the Virginia Freight Council City Pick Up and Delivery Supplemental Agreement thereto ("NMFA-Virginia Supplement"); and

(b) An agreement covering Johnson's Richmond, Virginia clerical employees.

Copies of the aforementioned contracts are attached as Exhibits B and C to the Affidavit of Joseph Gross filed with the Court on October 22, 1982.

13. Each of the collective bargaining agreements referred to in the preceding paragraph was effective from April 1, 1979 to March 31, 1982.

14. The Trust Agreement authorizes only the Trustees to establish a plan of pension benefits, to set the level of benefits provided thereunder, and to invest, manage, and control the assets of the Trust.

15. The Trust Agreement provides that in setting the level of benefits to be provided under the pension plan, the Trustees are obligated to use actuarial assumptions and methods that, in the aggregate, are reasonable and that take into account the experience of the Plan and its reasonable expectations.

16. The Trustees have the power to construe the provisions of the Trust Agreement and the terms used therein, and any construction adopted by the Trustees is binding on the participating employers.

17. Johnson was a participating employer in the Pension Fund from 1957 to August 8, 1980.

18. Under the terms of the collective bargaining agreements referred to in paragraph 12, Johnson was required to make weekly contributions to the Pension Fund on behalf of those of its employees covered by such agreements. As of August 8, 1980 the NMFA-Virginia Supplement required weekly contributions in the amount of $46.00 per employee while the Clerical Agreement mandated contributions of $28.00 per employee per week.

19. Other than with respect to its employees covered by the aforementioned collective bargaining agreements, Johnson had no obligation to make any contributions to the Pension Fund.

20. As of July 1975, Republic owned less than four percent of the outstanding stock of Johnson.

21. On May 5, 1978, Republic entered into a purchase agreement with the remaining shareholders of Johnson to purchase the entire amount of Johnson's outstanding stock. After obtaining approval of the acquisition from the Interstate Commerce Commission, Republic's complete control and ownership of Johnson was consummated on June 14, 1979.

23. Johnson announced on July 30, 1980, that it was ceasing operations and that there would be no pick-up service provided after August 8, 1980. On August 8, 1980, Johnson ceased all operations with respect to which it was obligated to make contributions to the Pension Fund on behalf of its employees covered by the terms of the collective bargaining agreements.

24. On August 8, 1981, one year after it ceased all operations, Johnson executed a plan of complete liquidation under which all of the remaining assets of the company were distributed to Republic, and Johnson was dissolved. The formal Certificate of Completed Liquidation was issued by the Secretary of State of North Carolina on July 14 ,1982.

25. On August 8, 1980, the date Johnson terminated all operations, it ceased making contributions to the Pension Fund.

26. Following Johnson's cessation of operations, the Pension Fund's Trustees directed the Pension Fund's Administrator, Joseph Gross, to take the actions necessary to enforce the employer withdrawal liability provisions of the MPPAA against Johnson. In accordance with such directions, Mr. Gross directed the Fund's actuary, Martin E. Segal Company, to compute Johnson's withdrawal liability to the Pension Fund in accordance with Section 4201(b) of the MPPAA, 29 U.S.C. § 1381(b). The Fund's actuary first computed Johnson's share of the Pension Fund's unfunded vested benefit liability under MPPAA Section 4211(b), 29 U.S.C. § 1391(b), the so-called "presumptive method", which previously had been adopted by

the Pension Fund's Trustees for the purpose of determining a withdrawing employer's allocable share of such benefits. Using that method, the Fund's actuary determined that Johnson's proportionate share of the Pension Fund's unfunded vested benefit liability was $189,107.00. The actuary further determined that, since that amount exceeded $150,000.00, there was no *de minimis* reduction applicable under Section 4209 of the MPPAA, 29 U.S.C. § 1389. Finally, the actuary determined that no adjustments to that amount were in order under Section 4219(c)(1)(B) of the MPPAA, 29 U.S.C. §§ 1399(c)(1)(B). Consequently, the Pension Fund's actuary concluded that Johnson's withdrawal liability to the Pension Fund was $189,107.00.

27. A portion of the Fund's unfunded vested benefit liability is attributable to the vesting requirements of ERISA.

28. By letter dated July 3, 1981, the Pension Fund notified Johnson that Johnson's withdrawal liability to the Fund was $189,107.00.

29. By letter dated July 9, 1982, the Pension Fund demanded that Republic, Johnson's successor in interest, satisfy the $189,107.00 in claimed withdrawal liability to the Fund. The Pension Fund extended Republic the option of paying its withdrawal liability in one lump sum or in installment payments, consisting of thirty-seven (37) payments of $5,651.00 and one final payment of $4,269.00. The Pension Fund demanded that Republic commence payment under either option within sixty days.

30. Republic did not make any employer withdrawal liability payments to the Pension Fund within sixty days, despite the Pension Fund's demand for the same.

31. On September 20, 1982, the Pension Fund advised Republic that it was delinquent on its employer withdrawal liability to the Fund and demanded that Republic cure this delinquency within sixty days. The Fund further informed Republic that its failure to cure the delinquency within the time frame would be treated as a default, entitling the Pension

Fund to immediate payment of the full amount of Republic's withdrawal liability under the terms of MPPAA section 4219(c)(5), 29 U.S.C. § 1399(c)(5).

32. Under section 4221 of the MPPAA, 29 U.S.C. § 1401, either party had the right to submit any dispute concerning the determination of Republic's withdrawal liability to arbitration, within the time limits specified in the statute. Neither Republic nor the Pension Fund has to date exercised the right to institute arbitration proceedings.

Stipulated and Agreed to:

/s/ Louis T. Urbanczyk
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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 82-0919-A

REPUBLIC INDUSTRIES, INC.,

Plaintiff,

v.

TEAMSTERS JOINT COUNCIL NO. 83
OF VIRGINIA PENSION FUND,

Defendant.

AMENDMENT TO STIPULATED FACTS

Paragraph 12 of the Stipulated Facts filed by the parties on December 8, 1982 is amended to read as follows:

12. As of August 8, 1980, Johnson was a party to the following collective bargaining agreements with respect to Johnson's Richmond, Virginia employees:

(a) The National Master Freight Agreement, and the Virginia Freight Council City Pick Up and Delivery Supplemental Agreement thereto, and Over-The-Road Supplemental Agreement thereto ("NMFA-Virginia Supplement"); and

(b) An agreement covering Johnson's Richmond, Virginia clerical employees.

Copies of the aforementioned contracts are attached as Exhibits B and C.

Stipulated and Agreed to:

/s/ Louis T. Urbanczyk
LOUIS T. URBANCZYK
3339 Mansfield Road
Baileys Crossroads, Va. 22041
(703) 379-2439, (202) 484-5911

Attorney for Republic Industries, Inc.

/s/ John M. Bryson, II
JOHN M. BRYSON, II
320 Maple Avenue, East
Vienna, Va. 22180
(202) 862-2000

Attorney for Teamsters Joint Council No. 83 of Virginia Pension Fund

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
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CIVIL ACTION NO. 82-0919-A

REPUBLIC INDUSTRIES, INC.,

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TEAMSTERS JOINT COUNCIL NO. 83
OF VIRGINIA PENSION FUND,

Defendant.

FILED
NOV 12 1982
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

ORDER

For the reasons stated from the bench, it is hereby ORDERED that:

1. The motion of the defendant to dismiss for failure to exhaust administrative remedies is denied.

2. The application of the plaintiff for preliminary injunction is denied.

3. The case is continued until December 17, 1982 for argument on the parties' cross-motions for summary judgment.

/s/ ALBERT V. BRYAN
United States District Judge

Alexandria, Virginia
November 12th, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 82-0919-A

REPUBLIC INDUSTRIES, INC.,

Plaintiff,

v.

TEAMSTERS JOINT COUNCIL NO. 83
OF VIRGINIA PENSION FUND,

Defendant.

ORDER

The Court, having considered plaintiff's motion for a stay pending appeal of the Court's judgment entered December 29, 1982, insofar as that judgment requires plaintff to initiate arbitration of the "separate facility" issue within sixty days, and defendant's response thereto that it does not oppose plaintiff's motion to stay solely that portion of the Court's judgment, it is, this 20th day of January, 1983, ADJUDGED and ORDERED:

1. The Court's judgment entered December 29, 1982 is stayed pending disposition of the appeal of this case by the United States Court of Appeals for the Fourth Circuit, only insofar as that judgment requires plaintiff to initiate arbitration of the "separate facility" issue within sixty days.

2. This stay does not relieve plaintiff of its statutory obligation to make interim payments on its withdrawal liability to defendant in accordance with section 4219(c) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1399(c).

/s/ ALBERT V. BRYAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 82-919-A

REPUBLIC INDUSTRIES, INC.,

Plaintiff,

v.

TEAMSTERS JOINT COUNCIL NO. 83
OF VIRGINIA PENSION FUND,

Defendant.

ORDER

For the reasons stated from the bench, and the court determining that the defendant is not entitled to an award of attorney's fees pursuant to 29 U.S.C. § 1451(e), it is hereby

ORDERED that the motion of the defendant for attorney's fees and costs is denied.

/s/ ALBERT V. BRYAN
United States District Judge

Alexandria, Virginia
January 28th, 1983

CLERK'S OFFICE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH & MAIN STREETS
RICHMOND, VIRGINIA 23219-3599

WILLIAM K. SLATE, II
CLERK

TELEPHONE
(804) 771-2213
FTS 925-2213

March 11, 1983

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Honorable William French Smith
Attorney General of United States
U.S. Department of Justice
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

Re: 83-1054(L), 83-1109, 83-1119 & 83-1196, Republic Industries, Inc., etc. vs. Teamsters Joint Council No. 83 of Virginia Pension Fund, etc.

Dear Sir,

Pursuant to Rule 44, Federal Rules of Appellate Procedure, you are hereby notified that Republic Industries, Inc., appellant/appellee in the above captioned cases, intends to raise in its opening brief to this court, due March 11, 1983, questions of the constitutionality of the Multiemployer Pension

Plan Amendments Act of 1980, Public Law 96-364, 94 Stat. 1208 (Sept. 26, 1980).

Sincerely yours,

WILLIAM K. SLATE, II

/s/By: Linda Y. Dorsey
LINDA Y. DORSEY
Deputy Clerk

/lyd
Enclosure

cc: Louis T. Urbanczyk, Esq.
3339 Mansfield Road
Falls Church, Va. 22041

Lester M. Bridgeman, Esq.
304 Capital Gallery East
600 Maryland Avenue, S.W.
Washington, D.C. 20024

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1250 Connecticut Ave., N.W.
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THE CONSTITUTION OF THE UNITED STATES

ARTICLE I

SECTION. 9. . . .

No Bill of Attainder or ex post facto Law shall be passed.

SECTION 10. No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Time, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

AMENDMENT V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980

PUB.L.NO. 96-364

94 STAT. 1208

SEC. 104. EMPLOYER WITHDRAWALS; MERGER OR TRANSFER OF PLAN ASSETS OR LIABILITIES: REORGANIZATION; MINIMUM CONTRIBUTION REQUIREMENT FOR MULTIEMPLOYER PLANS; FINANCIAL ASSISTANCE; BENEFITS AFTER TERMINATION; ENFORCEMENT.

Title IV is amended—

(1) by striking out the heading for subtitle E and inserting in lieu thereof the following:

"Subtitle F—Transition Rules And Effective Dates";

and

(2) by inserting after subtitle D the following new subtitle:

"Subtitle E—Special Provisions For Multiemployer Plans

"PART 1—EMPLOYER WITHDRAWALS

"WITHDRAWAL LIABILITY ESTABLISHED

[29 USC § 1381]

"SEC. 4201. (a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

"(b) For purposes of subsection (a)—

"(1) The withdrawal liability of an employer to a plan is the amount determined under section 4211 to be the allocable amount of unfunded vested benefits, adjusted—

"(A) first, by any de minimis reduction applicable under section 4209,

"(B) next, in the case of a partial withdrawal, in accordance with section 4206,

"(C) then, to the extent necessary to reflect the limitation on annual payments under section 4219(c)(1)(B), and

"(D) finally, in accordance with section 4225.

"(2) The term 'complete withdrawal' means a complete withdrawal described in section 4203.

"(3) The term 'partial withdrawal' means a partial withdrawal described in section 4205.

"DETERMINATION AND COLLECTION OF LIABILITY; NOTIFICATION OF EMPLOYER

[29 USC § 1382]

"SEC. 4202. When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—

"(1) determine the amount of the employer's withdrawal liability,

"(2) notify the employer of the amount of the withdrawal liability, and

"(3) collect the amount of the withdrawal liability from the employer.

"COMPLETE WITHDRAWAL

[29 USC § 1383]

"SEC. 4203. (a) For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

"(1) permanently ceases to have an obligation to contribute under the plan, or

"(2) permanently ceases all covered operations under the plan.

"(b)(1) Notwithstanding subsection (a), in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a

complete withdrawal occurs only as described in paragraph (2), if—

"(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

"(B) the plan—

"(i) primarily covers employees in the building and construction industry, or

"(ii) is amended to provide that this subsection applies to employers described in this paragraph.

"(2) A withdrawal occurs under this paragraph if—

"(A) an employer ceases to have an obligation to contribute under the plan, and

"(B) the employer—

"(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

"(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

"(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 4041A(a)(2)), paragraph (2) shall be applied by substituting '3 years' for '5 years' in subparagraph (B)(ii).

"(c)(1) Notwithstanding subsection (a), in the case of an employer that has an obligation to contribute under a plan for work performed in the entertainment industry, primarily on a temporary or project-by-project basis, if the plan primarily covers employees in the entertainment industry, a complete withdrawal occurs only as described in subsection (b)(2) applied by substituting 'plan' for 'collective bargaining agreement' in subparagraph (B)(i) thereof.

"(2) For purposes of this subsection, the term 'entertainment industry' means—

"(A) theater, motion picture (except to the extent provided in regulations prescribed by the corporation), radio, television, sound or visual recording, music, and dance, and

"(B) such other entertainment activities as the corporation may determine to be appropriate.

"(3) The corporation may by regulation exclude a group or class of employers described in the preceding sentence from the application of this subsection if the corporation determines that such exclusion is necessary—

"(A) to protect the interest of the plan's participants and beneficiaries, or

"(B) to prevent a significant risk of loss to the corporation with respect to the plan.

"(4) A plan may be amended to provide that this subsection shall not apply to a group or class of employers under the plan.

"(d)(1) Notwithstanding subsection (a), in the case of an employer who—

"(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described in such paragraph, and

"(B) does not continue to perform work within the jurisdiction of the plan,

a complete withdrawal occurs only as described in paragraph (3).

"(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking idustry, the household goods moving industry, or the public warehousing industry.

"(3) A withdrawal occurs under this paragraph if—

"(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

"(B) either—

"(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

"(ii) the employer fails to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of section 412, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

"(4) If, after an employer furnishes a bond or escrow to a plan under paragraph (3)(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessations by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operations ceased.

"(5) If the corporation determines that the employer has no further liability under the plan either—

"(A) because it determines that the contribution base of the plan has not suffered substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

"(B) because it may not make a determination under paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

"(6) Nothing in this subsection shall be construed as a limitaton on the amount of the withdrawal liability of any employer.

"(e) For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

"(f)(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c).

"(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules—

"(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

"(B) only if the corporation determines, in each instance in which special withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this title.

"SALE OF ASSETS

[29 USC § 1384]

"Sec. 4204. (a)(1) A complete or partial withdrawal of an employer (hereinafter in this section referred to as the 'seller') under this section does not occur solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party (hereinafter in this section referred to as the 'purchaser'), the seller ceases covered operations or ceases to have an obligation to contribute for such operations, if—

"(A) the purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan;

"(B) the purchaser provides to the plan for a period of 5 plan years commencing with the first plan year beginning after the sale of assets, a bond issued by a corporate surety company that is an acceptable surety for purposes of section 412 of this Act, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to the greater of—

"(i) the average annual contribution required to be made by the seller with respect to the operations under the plan for the 3 plan years preceding the plan year in which the sale of the employer's assets occurs, or

"(ii) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of the assets occurs,

which bond or escrow shall be paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan when due, at any time during the first 5 plan years beginning after the sale; and

"(C) the contract for sale provides that, if the purchaser withdraws in a complete withdrawal, or a partial withdrawal with respect to operations, during such first 5 plan years, the seller is secondarily liable for any withdrawal liability it would have had to the plan with respect to the operations (but for this section) if the liability of the purchaser with respect to the plan is not paid.

"(2) If the purchaser—

"(A) withdraws before the last day of the fifth plan year beginning after the sale, and

"(B) fails to make any withdrawal liability payment when due, then the seller shall pay to the plan an amount equal to the payment that would have been due from the seller but for this section.

"(3)(A) If all, or substantially all, of the seller's assets are distributed, or if the seller is liquidated before the end of the 5 plan year period described in paragraph (1)(C), then the seller shall provide a bond or amount in escrow equal to the present value of the withdrawal liability the seller would have had but for this subsection.

"(B) If only a portion of the seller's assets are distributed during such period, then a bond or escrow shall be required, in accordance with regulations prescribed by the corporation, in a manner consistent with subparagraph (A).

"(4) The liability of the party furnishing a bond or escrow under this subsection shall be reduced, upon payment of the bond or escrow to the plan, by the amount thereof.

"(b)(1) For the purposes of this part, the liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 plan years.

"(2) If the plan is in reorganization in the plan year in which the sale of assets occurs, the purchaser shall furnish a bond or escrow in an amount equal to 200 percent of the amount described in subsection (a)(1)(B).

"(c) The corporation may by regulation vary the standards in subparagraphs (B) and (C) of subsection (a)(1) if the variance would more effectively or equitably carry out the purposes of this title. Before it promulgates such regulations, the corporation may grant individual or class variances or exemptions from the requirements of such subparagraphs if the particular case warrants it. Before granting such an individual or class variance or exemption, the corporation—

"(1) shall publish notice in the Federal Register of the pendency of the variance or exemption,

"(2) shall require that adequate notice be given to interested persons, and

"(3) shall afford interested persons an opportunity to present their views.

"(d) For purposes of this section, the term 'unrelated party' means a purchaser or seller who does not bear a relationship to the seller or purchaser, as the case may be, that is described in section 267(b) of the Internal Revenue Code of 1954, or that is described in regulations prescribed by the corporation applying principles similar to the principles of such section.

"PARTIAL WITHDRAWALS

[29 USC § 1385]

"SEC. 4205. (a) Except as otherwise provided in this section, there is a partial withdrawal by an employer from a plan on the last day of plan year if for such plan year—

"(1) there is a 70-percent contribution decline, or

"(2) there is a partial cessation of the employer's contribution obligation.

"(b) For purposes of subsection (a)—

"(1)(A) There is a 70-percent contribution decline for any given plan year if during each plan year in the 3-year testing period the employer's contribution base units do not exceed 30 percent of the employer's contribution base units for the high base year,

"(B) For purposes of subparagraph (A)—

"(i) The term '3-year testing period' means the period consisting of the plan year and the immediately preceding 2 plan years.

"(ii) The number of contribution base units for the high base year is the average number of such units for the 2 plan years for which the employer's contribution base units were the highest within the 5 plan years immediately preceding the beginning of the 3-year testing period.

"(2)(A) There is a partial cessation of the employer's contribution obligation for the plan year if, during such year—

"(i) the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location, or

"(ii) an employer permanently ceases to have an obligation to contribute under the plan with respect to work performend at one or more but fewer than all of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased.

"(B) For purposes of subparagraph (A), a cessation of obligations under a collective bargaining agreement shall not be considered to have occurred solely because, with respect to the same plan, one agreement that requires

contributions to the plan has been substituted for another agreement.

"(c)(1) In the case of a plan in which a majority of the covered employees are employed in the retail food industry, the plan may be amended to provide that this section shall be applied with respect to such plan—

"(A) by substituting '35 percent' for '70 percent' in subsections (a) and (b), and

"(B) by substituting '65 percent' for '30 percent' in subsection (b).

"(2) Any amendment adopted under paragraph (1) shall provide rules for the equitable reduction of withdrawal liability in any case in which the number of the plan year of withdrawal of the employer, is higher than such number immediately after the withdrawal.

"(3) Section 4208 shall not apply to a plan which has been amended under paragraph (1).

"(d) In the case of a plan described in section 404(c) of the Internal Revenue Code of 1954, or a continuation thereof, the plan may be amended to provide rules setting forth other conditions consistent with the purposes of this Act under which an employer has liability for partial withdrawal.

"ADJUSTMENT FOR PARTIAL WITHDRAWAL

[29 USC § 1386]

"SEC. 4206. (a) The amount of an employer's liability for a partial withdrawal, before the application of sections 4219(c)(1) and 4225, is equal to the product of—

"(1) the amount determined under section 4211, and adjusted under section 4209 if appropriate, determined as if the employer had withdrawn from the plan in a complete withdrawal—

"(A) on the date of the partial withdrawal, or

"(B) in the case of a partial withdrawal described in section 4205(a)(1) (relating to 70-percent contribution de-

cline), on the last day of the first plan year in the 3-year testing period,

multiplied by

"(2) a fraction which is 1 minus a fraction—

"(A) the numerator of which is the employer's contribution base units for the plan year following the plan year in which the partial withdrawal occurs, and

"(B) the denominator of which is the average of the employer's contribution base units for—

"(i) except as provided in clause (ii), the 5 plan years immediately preceding the plan year in which the partial withdrawal occurs, or

"(ii) in the case of a partial withdrawal described in section 4205(a)(1) (relating to 70-percent contributon decline), the 5 plan years immediately preceding the beginning of the 3-year testing period.

"(b)(1) In the case of an employer that has withdrawal liability for a partial withdrawal from a plan, any withdrawal liability of that employer for a partial or complete withdrawal from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability (reduced by any abatement or reduction of such liability) of the employer with respect to the plan for a previous plan year.

"(2) The corporation shall prescribe such regulations as may be necessary to provide for proper adjustments in the reduction provided by paragraph (1) for—

"(A) changes in unfunded vested benefits arising after the close of the prior year for which partial withdrawal liability was determined.

"(B) changes in contribution base units occurring after the close of the prior year for which partial withdrawal liability was determined, and

"(C) any other factors for which it determines adjustment to be appropriate,

so that liability for any complete or partial withdrawal in any subsequent year (after the application of the reduction)

properly reflects the employer's share of liability with respect to the plan.

"REDUCTION OR WAIVER OF COMPLETE WITHDRAWAL LIABILITY

[29 USC § 1387]

"SEC. 4207. (a) The corporation shall provide by regulation for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from a plan subsequently resumes covered operations under the plan or renews an obligation to contribute under the plan, to the extent that the corporation determines that reduction or waiver of withdrawal liability is consistent with the purposes of this Act.

"(b) The corporation shall prescribe by regulation a procedure and standards for the amendment of plans to provide alternative rules for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute under the plan. The rules may apply only to the extent that the rules are consistent with the purposes of this Act.

"REDUCTION OF PARTIAL WITHDRAWAL LIABILITY

[29 USC § 1388]

"SEC. 4208. (a)(1) If, for any 2 consecutive plan years following the plan year in which an employer has partially withdrawn from a plan under section 4205(a)(1) (referred to elsewhere in this section as the 'partial withdrawal year'), the number of contribution base units with respect to which the employer has an obligation to contribute under the plan for each such year is not less than 90 percent of the total number of contribution base units with respect to which the employer had an obligation to contribute under the plan for the high base year (within the meaning of section 4205(b)(1)(B)(ii)), then the employer shall have no obligation to make payments with respect to such partial withdrawal (other than delinquent payments) for plan

years beginning after the second consecutive plan year following the partial withdrawal year.

"(2)(A) For any plan year for which the number of contribution base units with respect to which an employer who has partially withdrawn under section 4205(a)(1) has an obligation to contribute under the plan equals or exceeds the number of units for the highest year determined under paragraph (1) without regard to '90 percent of', the employer may furnish (in lieu of payment of the partial withdrawal liability determined under section 4206) a bond to the plan in the amount determined by the plan sponsor (not exceeding 50 percent of the annual payment otherwise required).

"(B) If the plan sponsor determines under paragraph (1) that the employer has no further liability to the plan for the partial withdrawal, then the bond shall be cancelled.

"(C) If the plan sponsor determines under paragraph (1) that the employer continues to have liability to the plan for the partial withdrawal, then—

"(i) the bond shall be paid to the plan,

"(ii) the employer shall immediately be liable for the outstanding amount of liability due with respect to the plan year for which the bond was posted, and

"(iii) the employer shall continue to make the partial withdrawal liability payments as they are due.

"(b) If—

"(1) for any 2 consecutive plan years following a partial withdrawal under section 4205(a)(1), the number of contribution base units with respect to which the employer has an obligation to contribute for each such year exceeds 30 percent of the total number of contribution base units with respect to which the employer had an obligation to contribute for the high base year (within the meaning of section 4205(b)(1)(B)(ii), and

"(2) the total number of contribution base units with respect to which all employers under the plan have obligations to contribute in each of such 2 consecutive years is

not less than 90 percent of the total number of contribution base units for which all employers had obligations to contribute in the partial withdrawal plan year;

then, the employer shall have no obligation to make payments with respect to such partial withdrawal (other than delinquent payments) for plan years beginning after the second such consecutive plan year.

"(c) In any case in which, in any plan year following a partial withdrawal under section 4205(a)(1), the number of contribution base units with respect to which the employer has an obligation to contribute for such year equals or exceeds 110 percent (or such other percentage as the plan may provide by amendment and which is not prohibited under regulations prescribed by the corporation) of the number of contribution base units with respect to which the employer had an obligation to contribute in the partial withdrawal year, then the amount of the employer's partial withdrawal liability payment for such year shall be reduced pro rata, in accordance with regulations prescribed by the corporation.

"(d)(1) An employer to whom section 4202(b) (relating to the building and construction industry) applies is liable for a partial withdrawal only if the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required.

"(2) An employer to whom section 4202(c) (relating to the entertainment industry) applies shall have no liability for a partial withdrawal except under the conditions and to the extent prescribed by the corporation by regulation.

"(e)(1) The corporation may prescribe regulations providing for the reduction or elimination of partial withdrawal liability under any conditions with respect to which the corporation determines that reduction or elimination of partial withdrawal liability is consistent with the purposes of this Act.

"(2) Under such regulations, reduction of withdrawal liability shall be provided only with respect to subsequent changes in the employer's contributions for the same operations, or under the same collective bargaining agreement, that gave rise to the partial withdrawal, and changes in the employer's contribution base units with respect to other facilities or other collective bargaining agreements shall not be taken into account.

"(3) The corporation shall prescribe by regulation a procedure by which a plan may by amendment adopt rules for the reduction or elimination of partial withdrawal liability under any other conditions, subject to the approval of the corporation based on its determination that adoption of such rules by the plan is consistent with the purposes of this Act.

"DE MINIMIS RULE

[29 USC § 1389]

"SEC. 4209. (a) Except in the case of a plan amended under subsection (b), the amount of the unfunded vested benefits allocable under section 4211 to an employer who withdraws from a plan shall be reduced by the smaller of—

"(1) ¾ of 1 percent of the plan's unfunded vested obligations (determined as of the end of the plan year ending before the date of withdrawal), or

"(2) $50,000,

reduced by the amount, if any, by which the unfunded vested benefits allowable to the employer, determined without regard to this subsection, exceeds $100,000.

"(b) A plan may be amended to provide for the reduction of the amount determined under section 4211 by not more than the greater of—

"(1) the amount determined under subsection (a), or

"(2) the lesser of—

"(A) the amount determined under subsection (a)(1), or

"(B) $100,000,

reduced by the amount, if any, by which the amount determined under section 4211 for the employer, determined without regard to this subsection, exceeds $150,000.

"(c) This section does not apply—

"(1) to an employer who withdraws in a plan year in which substantially all employers withdraw from the plan or,

"(2) in any case in which substantially all employers withdraw from the plan during a period of one or more plan years pursuant to an agreement or arrangement to withdraw, to an employer who withdraws pursuant to such agreement or arrangement.

"(d) In any action or proceeding to determine or collect withdrawal liability, if substantially all employers have withdrawn from a plan within a period of 3 plan years, an employer who has withdrawn from such plan during such period shall be presumed to have withdrawn from the plan pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

"NO WITHDRAWAL LIABILITY FOR CERTAIN TEMPORARY CONTRIBUTION OBLIGATION PERIODS

[29 USC § 1390]

"SEC. 4210. (a) An employer who withdraws from a plan in complete or partial withdrawal is not liable to the plan if the employer—

"(1) first had an obligation to contribute to the plan after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980,

"(2) had an obligation to contribute to the plan for no more than the lesser of—

"(A) 6 consecutive plan years preceding the date on which the employer withdraws, or

"(B) the number of years required for vesting under the plan,

"(3) was required to make contributions to the plan for each such plan year in an amount equal to less than 2 percent of the sum of all employer contributions made to the plan for each such year, and

"(4) has never avoided withdrawal liability because of the application of this section with respect to the plan.

"(b) Subsection (a) shall apply to an employer with respect to a plan only if—

"(1) the plan is not a plan which primarily covers employees in the building and construction industry;

"(2) the plan is amended to provide that subsection (a) applies;

"(3) the plan provides, or is amended to provide, that the reduction under section 411(a)(3)(E) of the Internal Revenue Code of 1954 applies with respect to the employees of the employer; and

"(4) the ratio of the assets of the plan for the plan year preceding the first plan year for which the employer was required to contribute to the plan to the benefit payments made during that plan year was at least 8 to 1.

"METHODS FOR COMPUTING WITHDRAWAL LIABILITY

[29 USC § 1391]

"SEC. 4211. (a) The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

"(b)(1) Except as provided in subsections (c) and (d), the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of—

"(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after April 28, 1980, as determined under paragraph (2),

"(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before April 29, 1980, as determined under paragraph (3); and

"(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

"(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after April 28, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—

"(i) after such date, and

"(ii) before the plan year in which the withdrawal of the employer occurs.

"(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which—

"(i) the unfunded vested benefits at the end of the plan year; exceeds

"(ii) the sum of—

"(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before April 29, 1980, and

"(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after April 28, 1980, and preceding the plan year for which the change is determined.

"(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

"(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before April 29, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

"(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—

"(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws; multiplied by

"(ii) a fraction—

"(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

"(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

"(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before April 29, 1980, is the product of—

"(A) such unamortized amount; multiplied by—

"(B) a fraction—

"(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before April 29, 1980, and

"(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before April 29, 1980, by all employers—

"(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

"(II) who had not withdrawn from the plan before such date.

"(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

"(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of—

"(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under title 11, United States Code, or similar proceedings.

"(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 4209, 4219(c)(1)(B), or section 4225 against an employer to whom a notice described in section 4219 has been sent, and

"(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

"(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

"(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of—

"(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year

preceding the plan year in which the employer withdraws); multiplied by

"(ii) the fraction defined in paragraph (2)(E)(ii).

"(c)(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d). A plan described in section 4203(b)(1)(B)(i) (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the unfunded vested benefits allocable to an employer not described in section 4203(b)(1)(A) shall be determined in a manner different from that provided in subsection (b).

"(2)(A) The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

"(B) The amount determined under this subparagraph is the product of—

"(i) the plan's unfunded vested benefits as of the end of the last plan year ending before April 29, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

"(ii) a fraction—

"(I) the numerator of which the sum of all contributions required to be made by the employer under the plan for the last 5 plan years ending before April 29, 1980, and

"(II) the denominator of which is the sum of all contributions made for the last 5 plan years ending before April 29, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after April 28, 1980, and who had not withdrawn from the plan before such date.

"(C) The amount determined under this subparagraph is the product of—

"(i) an amount equal to—

"(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

"(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after 28, 1980; multiplied by

"(ii) a fraction—

"(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws, and

"(II) the demonimator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer who withdrew from the plan under this part during those plan years.

"(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this title, where such adjustments would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

"(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of—

"(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by.

"(B) a fraction—

"(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

"(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

"(4)(A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of—

"(i) the plan's unfunded vested benefits which are attributable to participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

"(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

"(B) The plan's unfunded vested benefits which are attributable to participants' service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such

employer (determined under plan rules not inconsistent with regulations of the corporation) decreased by the share of plan assets determined under subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

"(C) The value of plan assets determined under this subparagraph is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws, which is determined by multiplying—

"(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

"(ii) a fraction—

"(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

"(II) the denominator of which is the value of all nonforfeitable benefits under the plan

as of the end of the plan year.

"(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

"(i) by multiplying the value of plan assets determined under subparagraph (C) by a fraction—

"(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to service with the employer, and

"(II) the denominator of which is the value of the nonforfeitable benefits which are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

"(ii) by multiplying the value of plan assets determined under subparagraph (C) by a fraction—

"(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding the plan year in which the employer withdraws and all preceding plan years; and

"(II) the denominator of which is the sum of all contributions (accumulated with interest) which have been made to the plan (for the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

"(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction—

"(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

"(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(II) which are attributable to service with respect to the employers described in such clause (ii)(II).

"(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which an employer withdraws, which is not attributable to service with employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which such employer withdraws, is equal to—

"(i) an amount equal to—

"(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

"(II) the value of nonforfeitable benefits under the plan at the end of such plan year which are attributable

to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

"(ii) an amount equal to—

"(I) the value of the plan assets as of the end of such plan year, reduced by

"(II) the value of plan assets as of the end of such plan year as determined under subparagraph (C); reduced by

"(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

"(F) The employer's proportional share described in the subparagraph (A)(ii) for a plan year is the amount determined under subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to the sum of the amounts determined under subparagraph (C) for all employers under the plan.

"(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to determine the employer's share of unfunded vested benefits not attributable to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

"(5)(A) The corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits under this section, subject to the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

"(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method shall provide for the allocation of substantially all of a plan's unfunded vested benefits among employers who have an obligation to contribute under the plan.

"(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a period of more than 5 but not more than 10 plan years may be used for determining the numerator and denominator of any fraction which is used under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

"(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this title, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

"(d)(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of the Internal Revenue Code of 1954, or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c).

"(2) Sections 4204, 4209, 4219(c)(1)(B), and 4225 shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

"(e) In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the last

plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

"(f) In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

"OBLIGATION TO CONTRIBUTE; SPECIAL RULES

[29 USC § 1392]

"SEC. 4212. (a) For purposes of this part, the term 'obligation to contribute' means an obligation to contribute arising—

"(1) under one or more collective bargaining (or related) agreements, or

"(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

"(b) Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

"(c) If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

"ACTUARIAL ASSUMPTIONS, ETC.

[29 USC § 1393]

"SEC. 4213. (a) The corporation may prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under

this part. Withdrawal liability under this part shall be determined by each plan on the basis of—

"(1) actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan, or

"(2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.

"(b) In determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part, the plan actuary may—

"(1) rely on the most recent complete actuarial valuation used for purposes of section 412 of the Internal Revenue Code of 1954 and reasonable estimates for the interim years of the unfunded vested benefits, and

"(2) in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan.

"(c) For purposes of this part, the term 'unfunded vested benefits' means with respect to a plan, an amount equal to—

"(A) the value of nonforfeitable benefits under the plan, less

"(B) the value of the assets of the plan.

"APPLICATION OF PLAN AMENDMENTS

[29 USC § 1394]

"SEC. 4214. (A) No plan rule or amendment adopted after January 31, 1981, under section 4209 or 4211(c) may be applied without the employer's consent with respect to liability for a withdrawal or partial withdrawal which occurred before the date on which the rule or amendment was adopted.

"(b) All plan rules and amendments authorized under this part shall operate and be applied uniformly with respect to

each employer, except that special provisions may be made to take into account the creditworthiness of an employer. The plan sponsor shall give notice to all employers who have an obligation to contribute under the plan and to all employee organizations representing employees covered under the plan of any plan rules or amendments adopted pursuant to this section.

"PLAN NOTIFICATION TO CORPORATION OF POTENTIALLY SIGNIFICANT WITHDRAWALS

[29 USC § 1395]

"SEC. 4215. The corporation may, by regulation, require the plan sponsor of a multiemployer plan to provide notice to the corporation when the withdrawal from the plan by any employer has resulted, or will result, in a significant reduction in the amount of aggregate contributions under the plan made by employers.

"SPECIAL RULES FOR SECTION 404(C) PLANS

[29 USC § 1396]

"SEC. 4216. (a) In the case of a plan described in subsection (b)—

"(1) if an employer withdraws prior to a termination described in section 4041A(a)(2), the amount of withdrawal liability to be paid in any year by such employer shall be an amount equal to the greater of—

"(A) the amount determined under section 4219(c)(1)(C)(i), or

"(B) the product of—

"(i) the number of contribution base units for which the employer would have been required to make contributions for the prior plan year if the employer had not withdrawn, multiplied by

"(ii) the contribution rate for the plan year which would be required to meet the amortization schedules contained in section 4243(d)(3)(B)(ii) (determined

without regard to any limitation on such rate otherwise provided by this title)

except that an employer shall not be required to pay an amount in excess of the withdrawal liability computed with interest; and

"(2) the withdrawal liability of an employer who withdraws after December 31, 1983, as a result of a termination described in section 4041(a)(2) which is agreed to by the labor organization that appoints the employee representative on the joint board of trustees which sponsors the plan, shall be determined under subsection (c) if—

"(A) as a result of prior employer withdrawals in any plan year commencing after January 1, 1980, the number of contribution base units is reduced to less than 67 percent of the average number of such units for the calendar years 1974 through 1979; and

"(B) at least 50 percent of the withdrawal liability attributable to the first 33 percent decline described in subparagraph (A) has been determined by the plan sponsor to be uncollectible within the meaning of regulations of the corporation of general applicability; and

"(C) the rate of employer contributions under the plan for each plan year following the first plan year beginning after the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980 and preceding the termination date equals or exceeds the rate described in section 4243(d)(3).

"(b) A plan is described in this subsection if—

"(1) it is a plan described in section 404(c) of the Internal Revenue Code of 1954 or a continuation thereof; and

"(2) participation in the plan is substantially limited to individuals who retired prior to January 1, 1976.

"(c)(1) The amount of an employer's liability under this paragraph is the product of—

"(A) the amount of the employer's withdrawal liability determined without regard to this section, and

"(B) the greater of 90 percent, or a fraction—

"(i) the numerator of which is an amount equal to the portion of the plan's unfunded vested benefits that is attributable to plan participants who have a total of 10 or more years of signatory service, and

"(ii) the denominator of which is an amount equal to the total unfunded vested benefits of the plan.

"(2) For purposes of paragraph (1), the term 'a year of signatory service' means a year during any portion of which a participant was employed for an employer who was obligated to contribute in that year, or who was subsequently obligated to contribute.

"APPLICATION OF PART IN CASE OF CERTAIN PRE-1980 WITHDRAWALS

[29 USC § 1397]

"SEC. 4217. (a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after April 28, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable—

"(1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before April 29, 1980, or

"(2) to work performed at a facility at which all covered operations permanently ceased before April 29, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

"(b) A plan may, in a manner not inconsistent with regulations, which shall be prescribed by the corporation, adjust the amount of unfunded vested benefits allocable to other employers under a plan maintained by an employer described in subsection (a).

"WITHDRAWAL NOT TO OCCUR MERELY BECAUSE OF CHANGE IN BUSINESS FORM OR SUSPENSION OF CONTRIBUTIONS DURING LABOR DISPUTE

[29 USC § 1398]

"SEC. 4218. Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—

"(1) an employer ceases to exist by reason of—

"(A) a change in corporate structure described in section 4062(d), or

"(B) a change to an unincorporated form of business enterprise,

if the change causes no interruption in employer contributions or obligations to contribute under the plan, or

"(2) an employer suspends contributions under the plan during a labor dispute involving its employees.

For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

"NOTICE, COLLECTION, ETC., OF WITHDRAWAL LIABILITY

[29 USC § 1399]

"SEC. 4219. (a) An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

"(b)(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

"(A) notify the employer of—

"(i) the amount of the liability and

"(ii) the schedule for liability payments, and

"(B) demand payment in accordance with the schedule.

"(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer—

"(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

"(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

"(iii) may furnish any additional relevant information to the plan sponsor.

"(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

"(i) the plan sponsor's decision,

"(ii) the basis for the decision, and

"(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

"(c)(1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 4211, adjusted if appropriate first under section 4209 and then under section 4206 over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

"(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

"(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

"(C)(i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of—

"(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

"(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 4205(a)(1) shall be deemed to occur on the last day of the first year of the 3-year testing period described in section 4205(b)(1)(B)(i).

"(ii)(I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under clause (i)) the average of the required employer contributions under the plan for the period of 3 consecutive plan years (during the period of 10 consecutive plan years ending with the plan year preceding the plan year in which the withdrawal occurs) for which such required contributions were the highest.

"(II) Subparagraph (B) shall not apply to any plan year to which this clause applies.

"(III) This clause shall not apply in the case of any withdrawal described in subparagraph (D).

"(IV) If under a plan this clause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

"(V) For purposes of this clause, the term 'required contributions' means, for any period, the amounts which the employer was obligated to contribute for such period (not taking into account any delinquent contribution for any other period).

"(iii) A plan may be amended to provide that for the first plan year ending on or after April 29, 1980, the number '5' shall be substituted for the number '10' each place it appears in clause (i) or clause (ii) (which-ever is appropriate). If the plan is so amended, the number '5' shall be increased by one for each succeeding plan year until the number '10' is reached.

"(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw from a plan pursuant to an agreement or arrangement to withdraw from the plan—

"(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subparagraph (B), and

"(ii) notwithstanding any other provision of this part, the total unfunded vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations which shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

"(E) In the case of a partial withdrawal described in section 4205(a), the amount of each annual payment shall be the product of—

"(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

"(ii) the fraction determined under section 4206(a)(2).

"(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

"(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

"(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

"(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term 'default' means—

> "(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and
>
> "(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

"(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation.

"(7) A multiemployer plan may adopt rules for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules—

> "(A) are consistent with this Act, and
>
> "(B) are not inconsistent with regulations of the corporation.

"(8) In the case of a terminated multiemployer plan, an employer's obligation to make payments under this section ceases at the end of the plan year in which the assets of the plan (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan, as determined by the corporation.

"(d) The prohibitions provided in section 406(a) do not apply to any action required or permitted under this part.

"APPROVAL OF AMENDMENTS

[29 USC § 1400]

"SEC. 4220. (a) Except as provided in subsection (b), if an amendment to a multiemployer plan authorized by any preceding section of this part is adopted more than 36 months after the effective date of this section, the amendment shall be effective only if the corporation approves the amendment, or, within 90 days after the corporation receives notice and a copy of the amendment from the plan sponsor, fails to disapprove the amendment.

"(b) An amendment permitted by section 4211(c)(5) may be adopted only in accordance with that section.

"(c) The corporation shall disapprove an amendment referred to in subsection (a) or (b) only if the corporation determines that the amendment creates an unreasonable risk of loss to plan participants and beneficiaries or to the corporation.

"RESOLUTION OF DISPUTES

[29 USC § 1401]

"SEC. 4221. (a)(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

"(A) the date of notification to the employer under section 4219(b)(2)(B), or

"(B) 120 days after the date of the employer's request under section 4219(b)(2)(A).

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 4219(b)(1).

"(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

"(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

"(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—

"(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

"(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

"(b)(1) If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor under section 4219(b)(1) shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

"(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 4301 to enforce, vacate, or modify the arbitrator's award.

"(3) Any arbitration proceedings under this section shall, to the extent consistent with this title, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena power), and enforced in United States courts as an arbitration proceeding carried out under title 9, United States Code.

"(c) In any proceeding under subsection (b), there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

"(d) Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 515).

"(e) If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

"REIMBURSEMENTS FOR UNCOLLECTIBLE WITHDRAWAL LIABILITY

[29 USC § 1402]

"SEC. 4222. (1) By May 1, 1982, the corporation shall establish by regulation a supplemental program to reimburse multiemployer plans for withdrawal liability payments which are due from employers and which are determined to be uncollectible for reasons arising out of cases or proceedings involving the employers under title 11, United States Code, or similar cases or proceedings. Participation in the supplemental program shall be on a voluntary basis, and a plan which elects coverage under the program shall pay premiums to the corporation in accordance with a premium schedule which shall be prescribed from time to time by the corporation. The premium schedule shall contain such rates and bases for the application of such rates as the corporation considers to be appropriate.

"(b) The corporation may provide under the program for reimbursement of amounts of withdrawal liability determined to be uncollectible for any other reasons the corporation considers appropriate.

"(c) The cost of the program (including such administrative and legal costs as the corporation considers appropriate) may be paid only out of premiums collected under such program.

"(d) The supplemental program may be offered to eligible plans on such terms and conditions, and with such limitations with respect to the payment of reimbursements (including the exclusion of de minimis amounts of uncollectible employer liability, and the reduction or elimination of reimbursements which cannot be paid from collected premiums) and such restrictions on withdrawal from the program, as the corporation considers necessary and appropriate.

"(e) The corporation may enter into arrangements with private insurers to carry out in whole or in part the program authorized by this section and may require plans which elect coverage under the program to elect coverage by those private insurers.

"WITHDRAWAL LIABILITY PAYMENT FUND

[29 USC § 1403]

"SEC. 4223. (a) The plan sponsors of multiemployer plans may establish or participate in a withdrawal liability payment fund.

"(b) For purposes of this section, the term 'withdrawal liability payment fund,' and the term 'fund,' mean a trust which—

"(1) is established and maintained under section 501(c)(22) of the Internal Revenue Code of 1954,

"(2) maintains agreements which cover a substantial portion of the participants who are in a multiemployer plans which (under the rules of the trust instrument) are eligible to participate in the fund,

"(3) is funded by amounts paid by the plans which participate in the fund, and

"(4) is administered by a Board of Trustees, and in the administration of the fund there is equal representation of—

"(A) trustees representing employers who are obligated to contribute to the plans participating in the fund, and

"(B) trustees representing employees who are participants in plans which participate in the fund.

"(c)(1) If an employer withdraws from a plan which participates in a withdrawal liability payment fund, then, to the extent provided in the trust, the funds shall pay to that plan—

"(A) the employer's unattributable liability,

"(B) the employer's withdrawal liability payments which would have been due but for section 4208, 4209, 4219, or 4225,

"(C) the employer's withdrawal liability payments to the extent they are uncollectible.

"(2) The fund may provide for the payment of the employer's attributable liability if the fund—

"(A) provides for the payment of both the attributable and the unattributable liability of the employer in a single payment, and

"(B) is subrogated to all rights of the plan against the employer.

"(3) For purposes of this section, the term—

"(A) 'attributable liability' means the excess, if any, determined under the provisions of a plan not inconsistent with regulations of the corporation, of—

"(i) the value of vested benefits accrued as a result of service with the employer, over

"(ii) the value of plan assets attributed to the employer, and

"(B) 'unattributable liability' means the excess of withdrawal liability over attributable liability.

Such terms may be further defined, and the manner in which they shall be applied may be prescribed, by the corporation by regulation.

"(4)(A) The trust of a fund shall be maintained for the exclusive purpose of paying—

"(i) any amount described in paragraph (1) and paragraph (2), and

"(ii) reasonable and necessary administrative expenses in connection with the establishment and operation of the trust and the processing of claims against the fund.

"(B) The amounts paid by a plan to a fund shall be deemed a reasonable expense of administering the plan under sections 403(c)(1) and 404(a)(1)(A)(ii), and the payments made by a fund to a participaing plan shall be deemed services necessary for the operation of that plan within the meaning of section 408(b)(2) or within the meaning of section 4975(d)(2) of the Internal Revenue Code of 1954.

"(d)(1) For purposes of this part—

"(A) only amounts paid by the fund to a plan under subsection (c)(1)(A) shall be credited to withdrawal liabil-

ity otherwise payable by the employer, unless the plan otherwise provides, and

"(B) any amounts paid by the fund under subsection (c) to a plan shall be treated by the plan as a payment of withdrawal liability to such plan.

"(2) For purposes of applying provisions relating to the funding standard accounts (and minimum contribution requirements), amounts paid from the plan to the fund shall be applied to reduce the amount treated as contributed to the plan.

"(e) The fund shall be subrogated to the rights of the plan against the employer that has withdrawn from the plan for amounts paid by a fund to a plan under—

"(1) subsection (c)(1)(A), to the extent not credited under subsection (d)(1)(A), and

"(2) subsection (c)(1)(C).

"(f) Notwithstanding any other provision of this Act, a fiduciary of the fund shall discharge the fiduciary's duties with respect to the fund in accordance with the standards for fiduciaries prescribed by this Act (to the extent not inconsistent with the purposes of this section), and in accordance with the documents and instruments governing the fund insofar as such documents and instruments are consistent with the provisions of this Act (to the extent not inconsistent with the purposes of this section). The provisions of the preceding sentence shall supersede any and all State laws relating to fiduciaries insofar as they may now or hereafter relate to a fund to which this section applies.

"(g) No payments shall be made from a fund to a plan on the occasion of a withdrawal or partial withdrawal of an employer from such plan if the employees representing the withdrawn contribution base units continue, after such withdrawal, to be represented under section 9 of the National Labor Relations Act (or other applicable labor laws) in negotiations with such employer by the labor organization which represented such employees immediately preceding such withdrawal.

"(h) Nothing in this section shall be construed to prohibit the purchase of insurance by an employer from any other person, to limit the circumstances under which such insurance would be payable, or to limit in any way the terms and conditions of such insurance.

"(i) The corporation may provide by regulation rules not inconsistent with this section governing the establishment and maintenance of funds, but only to the extent necessary to carry out the purposes of this part (other than section 4222).

"ALTERNATIVE METHOD OF WITHDRAWAL LIABILITY PAYMENTS

[29 USC § 1404]

"Sec. 4224. A mutiemployer plan may adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules are consistent with this Act and with such regulations as may be prescribed by the corporation.

"LIMITATION ON WITHDRAWAL LIABILITY

[29 USC § 1405]

"Sec. 4225. (a)(1) In the case of bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party (within the meaning of section 4204(d)), the unfunded vested benefits allocable to an employer (after the application of all sections of this part having a lower number designation than this section), other than an employer undergoing reorganization under title 11, United States Code, or similar provisions of State law, shall not exceed the greater of—

"(A) a portion (determined under paragraph (2) of the liquidation or dissolution value of the employer (determined after the sale or exchange of such assets), or

"(B) the unfunded vested benefits attributable to employees of the employer.

"(2) For purposes of paragraph (1), the portion shall be determined in accordance with the following table:

"If the liquidation or dissolution value of the employer after the sale or exchange is—	The portion is—
Not more than $2,000,000	30 percent of the amount.
More than $2,000,000, but not more than $4,000,000.	$600,00, plus 35 percent of the amount in excess of $2,000,000.
More than $4,000,000, but not more than $6,000,000.	$1,300,000, plus 40 percent of the amount in excess of $6,000,000.
More than $6,000,000, but not more than $7,000,000.	$2,100,000, plus 45 percent of the amount in excess of $6,000,000
More than $7,000,000, but not more than $8,000,000.	$2,550,000, plus 50 percent of the amount in excess of $7,000,000.
More than $8,000,000, but not more than $9,000,000.	$3,050,000, plus 60 percent of the amount in excess of $8,000,000.
More than $9,000,000, but not more than $10,000,000.	$3,650,000, plus 70 percent of the amount in excess of $9,000,000.
More than $10,000,000	$4,350,000, plus 80 percent of the amount in excess of $10,000,000.

"(b) In the case of an insolvent employer undergoing liquidation or dissolution, the unfunded vested benefits allocable to that employer shall not exceed an amount equal to the sum of—

"(1) 50 percent of the unfunded vested benefits allocable to the employer (determined without regard to this section), and

"(2) that portion of 50 percent of the unfunded vested benefits allocable to the employer (as determined under paragraph (1)) which does not exceed the liquidation or dissolution value of the employer determined—

"(A) as of the commencement of liquidation of dissolution, and,

"(B) after reducing the liquidation or dissolution value of the employer by the amount determined under paragraph (1).

"(c) To the extent that the withdrawal liability of an employer is attributable to his obligation to contribute to or under a

plan as an individual (whether as a sole proprietor or as a member of a partnership), property which may be exempt from the estate under section 522 of title 11, United States Code, or under similar provisions of law, shall not subject to enforcement of such liability.

"(d) For purposes of this section—

"(1) an employer is insolvent if the liabilities of the employer, including withdrawal liability under the plan (determined without regard to subsection (b)), exceed the assets of the employer (determined as of the commencement of the liquidation or dissolution), and

"(2) the liquidation or dissolution value of the employer shall be determined without regard to such withdrawal liability.

"(e) In the case of one or more withdrawals of an employer attributable to the same sale, liquidation, or dissolution, under regulations prescribed by the corporation—

"(1) all such withdrawals shall be treated as a single withdrawal for the purpose of applying this section, and

"(2) the withdrawal liability of the employer to each plan shall be an amount which bears the same ratio to the present value of the withdrawal liability payments to all plans (after the application of the preceding provisions of this section) as the withdrawal liability of the employer to such plan (determined without regard to this section) bears to the withdrawal liability of the employer to all such plans (determined without regard to this section).

"PART 2—MERGER OR TRANSFER OF PLAN ASSETS OR LIABILITIES

"MERGERS AND TRANSFERS BETWEEN MULTIEMPLOYER PLANS

[29 USC § 1411]

"SEC. 4231. (a) Unless otherwise provided in regulations prescribed by the corporation, a plan sponsor may not cause a multiemployer plan to merge with one or more multiemployer plans, or engage in a transfer of assets and liabilities to or from

another multiemployer plan, unless such merger or transfer satisfies the requirements of subsection (b).

"(b) A merger or transfer satisfies the requirements of this section if—

"(1) in accordance with regulations of the corporation, the plan sponsor of a multiemployer plan notifies the corporation of a merger with or transfer of plan assets or liabilities to another multiemployer plan at least 120 days before the effective date of the merger or transfer;

"(2) no participant's or beneficiary's accrued benefit will be lower immediately after the effective date of the merger or transfer than the benefit immediately before that date;

"(3) the benefits of participants and beneficiaries are not reasonably expected to be subject to suspension under section 4245; and

"(4) an actuarials valuation of the assets and liabilities of each of the affected plans has been performed during the plan year preceding the effective date of the merger or transfer, based upon the most recent data available as of the day before the start of that plan year, or other valuation of such assets and liabilities performed under such standards and procedures as the corporation may prescribe by regulation.

"(c) The merger of multiemployer plans or the transfer of assets or liabilities between multiemployer plans, shall be deemed not to constitute a violation of the provisions of section 406(a) or section 406(b)(2) if the corporation determines that the merger or transfer otherwise satisfies the requirements of this section.

"(d) A plan to which liabilities are transferred under this section is a successor plan for purposes of section 4022A(b)(2)(B).

"TRANSFERS BETWEEN A MULTIEMPLOYER PLAN AND A SINGLE-EMPLOYER PLAN

[29 USC § 1412]

"SEC. 4232. (a) A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section.

"(b) No accrued benefit of a participant or beneficiary may be lower immediately after the effective date of a transfer or merger described in subsection (a) than the benefit immediately before that date.

"(c)(1) Except as provided in paragraphs (2) and (3), a multiemployer plan which transfers liabilities to a single-employer plan shall be liable to the corporation if the single-employer plan terminates within 60 months after the effective date of the transfer. The amount of liability shall be the lesser of—

"(A) the amount of the plan asset insufficiency of the terminated single-employer plan, less 30 percent of the net worth of the employer who maintained the single-employer plan, determined in accordance with section 4062 or 4064, or

"(B) the value, on the effective date of the transfer, of the unfunded benefits transferred to the single-employer plan which are guaranteed under section 4022.

"(2) A multiemployer plan shall be liable to the corporation as provided in paragraph (1) unless, within 180 days after the corporation receives an application (together with such information as the corporation may reasonably require for purposes of such application) from the multiemployer plan sponsor for a determination under this paragraph—

"(A) the corporation determines that the interests of the plan participants and beneficiaries and of the corporation are adequately protected, or

"(B) fails to make any determination regarding the adequacy with which such interests are protected with respect to such transfer of liabilities.

If, after the receipt of such application, the corporation requests from the plan sponsor additional information necessary for the determination, the running of the 180-day period shall be suspended from the date of such request until the receipt by the corporation of the additional information requested. The corporation may by regulation prescribe procedures and standards for the issuance of determinations under this paragraph. This paragraph shall not apply to any application submitted less than 180 days after the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980.

"(3) A multiemployer plan shall not be liable to the corporation as provided in paragraph (1) in the case of a transfer from the multiemployer plan to a single-employer plan of liabilities which accrued under a single-employer plan which merged with the multiemployer plan, if, the value of liabilities transferred to the single-employer plan does not exceed the value of the liabilities for benefits which accrued before the merger, and the value of the assets transferred to the single-employer plan is substantially equal to the value of the assets which would have been in the single-employer plan if the employer had maintained and funded it as a separate plan under which no benefits accrued after the date of the merger.

"(4) The corporation may make equitable arrangements with multiemployer plans which are liable under this subsection for satisfaction of their liability.

"(d) Benefits under a single-employer plan to which liabilities are transferred in accordance with this section are guaranteed under section 4022 to the extent provided in that section as of the effective date of the transfer and the plan is a successor plan.

"(e)(1) Except as provided in paragraph (2), a multiemployer plan may not transfer liabilities to a single-employer plan unless the plan sponsor of the plan to which the liabilities would be transferred agrees to the transfer.

"(2) In the case of a transfer described in subsection (c)(3), paragraph (1) of this subsection is satisfied by the advance

agreement to the transfer by the employer who will be obligated to contribute to the single-employer plan.

"(f)(1) The corporation may prescribe by regulation such additional requirements with respect to the transfer of assets or liabilities as may be necessary to protect the interests of plan participants and beneficiaries and the corporation.

"(2) Except as otherwise determined by the corporation, a transfer of assets or liabilities to a single-employer plan from a plan in reorganization under section 4241 is not effective unless the corporation approves such transfer.

"(3) No transfer to which this section applies, in connection with a termination described in section 4041A(a)(2) shall be effective unless the transfer meets such requirements as may be established by the corporation to prevent an increase in the risk of loss to the corporation.

"PARTITION

[29 USC § 1413]

"SEC. 4233. (a) The corporation may order the partition of a multiemployer plan in accordance with this section.

"(b) A plan sponsor may apply to the corporation for an order partitioning a plan. The corporation may not order the partition of a plan except upon notice to the plan sponsor and the participants and beneficiaries whose vested benefits will be affected by the partition of the plan, and upon finding that—

"(1) a substantial reduction in the amount of aggregate contributions under the plan has resulted or will result from a case or proceeding under title 11, United States Code, with respect to an employer;

"(2) the plan is likely to become insolvent;

"(3) contributions will have to be increased significantly in reorganization to meet the minimum contribution requirement and prevent insolvency; and

"(4) partition would significantly reduce the likelihood that the plan will become insolvent.

"(c) The corporation may order the partition of a plan notwithstanding the pendency of a proceeding described in subsection (b)(1).

"(d) The corporation's partition order shall provide for a transfer of no more than the nonforfeitable benefits directly attributable to service with the employer referred to in subsection (b)(1) and an equitable share of assets.

"(e) The plan created by the partition is—

"(1) a successor plan to which section 4022A applies, and

"(2) a terminated multiemployer plan to which section 4041A(d) applies, with respect to which only the employer described in subsection (b)(1) has withdrawal liability, and to which section 4068 applies.

"(f) The corporation may proceed under section 4042(c) through (h) for a decree partitioning a plan and appointing a trustee for the terminated portion of a partitioned plan. The court may order the partition of a plan upon making the findings described in subsection (b)(1) through (4), and subject to the conditions set forth in subsections (c) through (e).

"ASSET TRANSFER RULES

[29 USC § 1414]

"SEC. 4234. (a) A transfer of assets from a multiemployer plan to another plan shall comply with asset-transfer rules which shall be adopted by the multiemployer plan and which—

"(1) do not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities, and

"(2) operate and are applied uniformly with respect to each proposed transfer, except that the rules may provide for reasonable variations taking into account the potential financial impact of a proposed transfer on the multiemployer plan.

Plan rules authorizing asset transfers consistent with the requirements of section 4232(c)(3) shall be considered to satisfy the requirements of this subsection.

"(b) The corporation shall prescribe regulations which exempt de minimis transfers of assets from the requirements of this part.

"(c) This part shall not apply to transfers of assets pursuant to written reciprocity agreements, except to the extent provided in regulations prescribed by the corporation.

"TRANSFERS PURSUANT TO CHANGE IN BARGAINING REPRESENTATIVE

[29 USC § 1415]

"SEC. 4235. (a) In any case in which an employer has completely or partially withdrawn from a multiemployer plan (hereafter in this section referred to as the 'old plan') as a result of a certified change of collective bargaining representative occurring after April 28, 1980, if participants of the old plan who are employed by the employer will, as a result of that change, participate in another multiemployer plan (hereafter in this section referred to as the 'new plan'), the old plan shall transfer assets and liabilities to the new plan in accordance with this section.

"(b)(1) The employer shall notify the plan sponsor of the old plan of a change in multiemployer plan participation described in subsection (a) no later than 30 days after the employer determines that the change will occur.

"(2) The plan sponsor of the old plan shall—

"(A) notify the employer of—

"(i) the amount of the employer's withdrawal liability determined under part 1 with respect to the withdrawal,

"(ii) the old plan's intent to transfer to the new plan the nonforfeitable benefits of the employees who are no longer working in covered service under the old plan as a result of the change of bargaining representative, and

"(iii) the amount of assets and liabilities which are to be transferred to the new plan, and

"(B) notify the plan sponsor of the new plan of the benefits, assets, and liabilities which will be transferred to the new plan.

"(3) Within 60 days after receipt of the notice described in paragraph (2)(B), the new plan may file an appeal with the corporation to prevent the transfer. The transfer shall not be made if the corporation determines that the new plan would suffer substantial financial harm as a result of the transfer. Upon notification described in paragraph (2), if—

"(A) the employer fails to object to the transfer within 60 days after receipt of the notice described in paragraph (2)(A), or

"(B) the new plan either—

"(i) fails to file such an appeal, or

"(ii) the corporation, pursuant to such an appeal, fails to find that the new plan would suffer substantial financial harm as a result of the transfer described in the notice under paragraph (2)(B) within 180 days after the date on which the appeal is filed,

then the plan sponsor of the old plan shall transfer the appropriate amount of assets and liabilities to the new plan.

"(c) If the plan sponsor of the old plan transfers the appropriate amount of assets and liabilities under this section to the new plan, then the amount of the employer's withdrawal liability (as determined under section 4201(b) without regard to such transfer and this section) with respect to the old plan shall be reduced by the amount by which—

"(1) the value of the unfunded vested benefits allocable to the employer which were transferred by the plan sponsor of the old plan to the new plan, exceeds

"(2) the value of the assets transferred.

"(d) In any case in which there is a complete or partial withdrawal described in subsection (a), if—

"(1) the new plan files an appeal with the corporation under subsection (b)(3), and

"(2) the employer is required by section 4219 to begin making payments of withdrawal liability before the earlier of—

"(A) the date on which the corporation finds that the new plan would not suffer substantial financial harm as a result of the transfer, or

"(B) the last day of the 180-day period beginning on the date on which the new plan files its appeal,

then the employer shall make such payments into an escrow held by a bank or similar financial institution satisfactory to the old plan. If the transfer is made, the amounts paid into the escrow shall be returned to the employer. If the transfer is not made, the amounts paid into the escrow shall be paid to the old plan and credited against the employer's withdrawal liability.

"(e)(1) Notwithstanding subsection (b), the plan sponsor shall not transfer any assets to the new plan if—

"(A) the old plan is in reorganization (within the meaning of section 4241(a)), or

"(B) the transfer of assets would cause the old plan to go into reorganization (within the meaning of section 4241(a)).

"(2) In any case in which a transfer of assets from the old plan to the new plan is prohibited by paragraph (1), the plan sponsor of the old plan shall transfer—

"(A) all nonforfeitable benefits described in subsection (b)(2), if the value of such benefits does not exceed the withdrawal liability of the employer with respect to such withdrawal, or

"(B) such nonforfeitable benefits having a value equal to the withdrawal liability of the employer, if the value of such benefits exceeds the withdrawal liability of the employer.

"(f)(1) Notwithstanding subsections (b) and (e), the plan sponsors of the old plan and the new plan may agree to a transfer of assets and liabilities that complies with sections 4231 and 4234, rather than this section, except that the employer's liability with respect to the withdrawal from the old

plan shall be reduced under subsection (c) as if assets and liabilities had been transferred in accordance with this section.

"(2) If the employer withdraws from the new plan within 240 months after the effective date of a transfer of assets and liabilities described in this section, the amount of the employer's withdrawal liability to the new plan shall be the greater of—

"(A) the employer's withdrawal liability determined under part 1 with respect to the new plan, or

"(B) the amount by which the employer's withdrawal liability to the old plan was reduced under subsection (c), reduced by 5 percent for each 12-month period following the effective date of the transfer and ending before the date of the withdrawal from the new plan.

"(g) For purposes of this section—

"(1) 'appropriate amount of assets' means the amount by which the value of the nonforfeitable benefits to be transferred exceeds the amount of the employer's withdrawal liability to the old plan (determined under part 1 without regard to section 4211(e)), and

"(2) 'certified change of collective bargaining representative' means a change of collective bargaining representative certified under the Labor-Management Relations Act, 1947, or the Railway Labor Act.

"PART 3—REORGANIZATION; MINIMUM CONTRIBUTION REQUIREMENT FOR MULTIEMPLOYER PLANS

"REORGANIZATION STATUS

[29 USC § 1421]

"SEC. 4241. (a) A multiemployer plan is in reorganization for a plan year if the plan's reorganization index for that year is greater than zero.

"(b)(1) A plan's reorganization index for any plan year is the excess of—

"(A) the vested benefits charge for such year, over

"(B) the net charge to the funding standard account for such year.

"(2) For purposes of this part, the net charge to the funding standard account for any plan year is the excess (if any) of—

"(A) the charges to the funding standard account for such year under section 412(b)(2) of the Internal Revenue Code of 1954, over

"(B) the credits to the funding standard account under section 412(b)(3)(B) of such Code.

"(3) For purposes of this part, the vested benefits charge for any plan year is the amount which would be necessary to amortize the plan's unfunded vested benefits as of the end of the base plan year in equal annual installments—

"(A) over 10 years, to the extent such benefits are attributable to persons in pay status, and

"(B) over 25 years, to the extent such benefits are attributable to other participants.

"(4)(A) The vested benefits charge for a plan year shall be based on an actuarial valuation of the plan as of the end of the base plan year, adjusted to reflect—

"(i) any—

"(I) decrease of 5 percent or more in the value of plan assets, or increase of 5 percent or more in the number of persons in pay status, during the period beginning on the first day of the plan year following the base plan year and ending on the adjustment date, or

"(II) at the election of the plan sponsor, actuarial valuation of the plan as of the adjustment date or any later date not later than the last day of the plan year for which the determination is being made,

"(ii) any change in benefits under the plan which is not otherwise taken into account under this subparagraph and which is pursuant to any amendment—

"(I) adopted before the end of the plan year for which the determination is being made, and

"(II) effective after the end of the base plan year and on or before the end of the plan year referred to in subclause (I), and

"(iii) any other event (including an event described in subparagraph (B)(i)(I)) which, as determined in accordance with regulations prescribed by the Secretary, would substantially increase the plan's vested benefit charge.

"(B)(i) In determining the vested benefits charge for a plan year following a plan year in which the plan was not in reorganization, any change in benefits which—

"(I) results from the changing of a group of participants from one benefit level to another benefit level under a schedule of plan benefits as a result of changes in a collective bargaining agreement, or

"(II) results from any other change in a collective bargaining agreement,

shall not be taken into account except to the extent provided in regulations prescribed by the Secretary of the Treasury.

"(ii) Except as otherwise determined by the Secretary of the Treasury, in determining the vested benefits charge for any plan year following any plan year in which the plan was in reorganization, any change in benefits—

"(I) described in clause (i)(I), or

"(II) described in clause (i)(II) as determined under regulations prescribed by the Secretary of the Treasury,

shall, for purposes of subparagraph (A)(ii), be treated as a change in benefits pursuant to an amendment to a plan.

"(5)(A) For purposes of this part, the base plan year for any plan year is—

"(i) if there is a relevant collective bargaining agreement, the last plan year ending at least 6 months before the relevant effective date, or

"(ii) if there is no relevant collective bargaining agreement, the last plan year ending at least 12 months before the beginning of the plan year.

"(B) For purposes of this part, a relevant collective bargaining agreement is a collective bargaining agreement—

"(i) which is in effect for at least 6 months during the plan year, and

"(ii) which has not been in effect for more than 36 months as of the end of the plan year.

"(C) For purposes of this part, the relevant effective date is the earliest of the effective dates for the relevant collective bargaining agreements.

"(D) For purposes of this part, the adjustment date is the date which is—

"(i) 90 days before the relevant effective date, or

"(ii) if there is no relevant effective date, 90 days before the beginning of the plan year.

"(6) For purposes of this part, the term 'person in pay status' means—

"(A) a participant or beneficiary on the last day of the base plan year who, at any time during such year, was paid an early, late, normal, or disability retirement benefit (or a death benefit related to a retirement benefit), and

"(B) to the extent provided in regulations prescribed by the Secretary of the Treasury, any other person who is entitled to such a benefit under the plan.

"(7) For purposes of paragraph (3)—

"(A) in determining the plan's unfunded vested benefits, plan assets shall first be allocated to the vested benefits attributable to persons in pay status, and

"(B) the vested benefits charge shall be determined without regard to reductions in accrued benefits under section 4244A which are first effective in the plan year.

"(8) For purposes of this part, any outstanding claim for withdrawal liability shall not be considered a plan asset, except as otherwise provided in regulations prescribed by the Secretary of the Treasury.

"(9) For purposes of this part, the term 'unfunded vested benefits' means with respect to a plan, an amount (determined in accordance with regulations prescribed by the Secretary of the Treasury) equal to—

"(A) the value of nonforfeitable benefits under the plan, less

"(B) the value of assets of the plan.

"(c) Except as provided in regulations prescribed by the corporation, while a plan is in reorganization a benefit with respect to a participant (other than a death benefit) which is attributable to employer contributions and which has a value of more than $1,750 may not be paid in a form other than an annuity which (by itself or in combination with social security, railroad retirement, or workers' compensation benefits) provides substantially level payments over the life of the participant.

"(d) Any multiemployer plan which terminates under section 4041A(a)(2) shall not be considered in reorganization after the last day of the plan year in which the plan is treated as having terminated.

"NOTICE OF REORGANIZATION AND FUNDING REQUIREMENTS

[29 USC § 1422]

"SEC. 4242. (a)(1) If—

"(A) a multiemployer plan is in reorganization for a plan year, and

"(B) section 4243 would require an increase in contributions for such plan year,

the plan sponsor shall notify the persons described in paragraph (2) that the plan is in reorganization and that, if contributions to the plan are not increased, accrued benefits under the plan may be reduced or an excise tax may be imposed (or both such reduction and imposition may occur).

"(2) The persons described in this paragraph are—

"(A) each employer who has an obligation to contribute under the plan (within the meaning of section 4201(h)(5)), and

"(B) each employee organization which, for purposes of collective bargaining, represents plan participants employed by such an employer.

"(3) The determination under paragraph (1)(B) shall be made without regard to the overburden credit provided by section 4244.

"(b) The corporation may prescribe additional or alternative requirements for assuring, in the case of a plan with respect to which notice is required by subsection (a)(1), that the persons described in subsection (a)(2)—

"(1) receive appropriate notice that the plan is in reorganization,

"(2) are adequately informed of the implications of reorganization status, and

"(3) have reasonable access to information relevant to the plan's reorganization status.

"MINIMUM CONTRIBUTION REQUIREMENT

[29 USC § 1423]

"Sec. 4243. (a)(1) For any plan year for which a plan is in reorganization—

"(A) the plan shall continue to maintain its funding standard account while it is in reorganization, and

"(B) the plan's accumulated funding deficiency under section 302(a) for such plan year shall be equal to the excess (if any) of—

"(i) the sum of the minimum contribution requirement for such plan year (taking into account any overburden credit under section 4244(a)) plus the plan's accumulated funding deficiency for the preceding plan year (determined under this section if the plan was in reorganization during such year or under section 302(a) if the plan was not in reorganization), over

"(ii) amounts considered contributed by employers to or under the plan for the plan year (increased by any amount waived under subsection (f) for the plan year).

"(2) For purposes of paragraph (1), withdrawal liability payments (whether or not received) which are due with respect to withdrawals before the end of the base plan year shall be considered amounts contributed by the employer to or under the plan if, as of the adjustment date, it was reasonable for the plan sponsor to anticipate that such payments would be made during the plan year.

"(b)(1) Except as otherwise provided in this section, for purposes of this part the minimum contribution requirement for a plan year in which a plan is in reorganization is an amount equal to the excess of—

"(A) the sum of—

"(i) the plan's vested benefits charge for the plan year, and

"(ii) the increase in normal cost for the plan year determined under the entry age normal funding method which is attributable to plan amendments adopted while the plan was in reorganization, over

"(B) the amount of the overburden credit (if any) determined under section 4244 for the plan year.

"(2) If the plan's current contribution base for the plan year is less than the plan's valuation contribution base for the plan year, the minimum contribution requirement for such plan year shall be equal to the product of the amount determined under paragraph (1) (after any adjustment required by this part other than this paragraph) and a fraction—

"(A) the numerator of which is the plan's current contribution base for the plan year, and

"(B) the denominator of which is the plan's valuation contribution base for the plan year.

"(3)(A) If the vested benefits charge for a plan year of a plan in reorganization is less than the plan's cash-flow amount for

the plan year, the plan's minimum contribution requirement for the plan year is the amount determined under paragraph (1) (determined before the application of paragraph (2)) after substituting the term 'cash-flow amount' for the term 'vested benefits charge' in paragraph (1)(A).

"(B) For purposes of subparagraph (A), a plan's cash-flow amount for a plan year is an amount equal to—

"(i) the amount of the benefits payable under the plan for the base plan year, plus the amount of the plan's administrative expenses for the base plan year, reduced by

"(ii) the value of the available plan assets for the base plan year determined under regulations prescribed by the Secretary of the Treasury,

adjusted in a manner consistent with section 4241(b)(4).

"(c)(1) For purposes of this part, a plan's current contribution base for a plan year is the number of contribution base units with respect to which contributions are required to be made under the plan for that plan year, determined in accordance with regulations prescribed by the Secretary of the Treasury.

"(2)(A) Except as provided in subparagraph (B), for purposes of this part a plan's valuation contribution base is the number of contribution base units for which contributions were received for the base plan year—

"(i) adjusted to reflect declines in the contribution base which have occurred (or could reasonably be anticipated) as of the adjustment date for the plan year referred to in paragraph (1),

"(ii) adjusted upward (in accordance with regulations prescribed by the Secretary of the Treasury) for any contribution base reduction in the base plan year caused by a strike or lockout or by unusual events, such as fire, earthquake, or severe weather conditions, and

"(iii) adjusted (in accordance with regulations prescribed by the Secretary of the Treasury) for reductions in

the contribution base resulting from transfers of liabilities.

"(B) For any plan year—

"(i) in which the plan is insolvent (within the meaning of section 4245(b)(1)), and

"(ii) beginning with the first plan year beginning after the expiration of all relevant collective bargaining agreements which were in effect in the plan year in which the plan became insolvent,

the plan's valuation contribution base is the greater of the number of contribution base units for which contributions were received for the first or second plan year preceding the first plan year in which the plan is insolvent, adjusted as provided in clause (ii) or (iii) or subparagraph (A).

"(d)(1) Under regulations prescribed by the Secretary of the Treasury, the minimum contribution requirement applicable to any plan for any plan year which is determined under subsection (b) (without regard to subsection (b)(2)) shall not exceed an amount which is equal to the sum of—

"(A) the greater of—

"(i) the funding standard requirement for such plan year, or

"(ii) 107 percent of—

"(I) if the plan was not in reorganization in the preceding plan year, the funding standard requirement for such preceding plan year, or

"(II) if the plan was in reorganization in the preceding plan year, the sum of the amount determined under this subparagraph for the preceding plan year and the amount (if any) determined under subparagraph (B) for the preceding plan year, plus

"(B) if for the plan year a change in benefits is first required to be considered in computing the charges under section

412(b)(2) (A) or (B) of the Internal Revenue Code of 1954, the sum of—

"(i) the increase in normal cost for a plan year determined under the entry age normal funding method due to increases in benefits described in section 4241(b)(4)(A)(ii) (determined without regard to section 4241(b)(4)(B)(i)), and

"(ii) the amount necessary to amortize in equal annual installments the increase in the value of vested benefits under the plan due to increases in benefits described in clause (i) over—

"(I) 10 years, to the extent such increase in value is attributable to persons in pay status, or

"(II) 25 years, to the extent such increase in value is attributable to other participants.

"(2) For purposes of paragraph (1), the funding standard requirement for any plan year is an amount equal to the net charge to the funding standard account for such plan year (as defined in section 4241(b)(2)).

"(3)(A) In the case of a plan described in section 4216(b), if a plan amendment which increases benefits is adopted after January 1, 1980—

"(i) paragraph (1) shall apply only if the plan is a plan described in subparagraph (B), and

"(ii) the amount under paragraph (1) shall be determined without regard to paragraph (1)(B).

"(B) A plan is described in this subparagraph if—

"(i) the rate of employer contributions under the plan for the first plan year beginning on or after the date on which an amendment increasing benefits is adopted, multiplied by the valuation contribution base for that plan year, equals or exceeds the sum of—

"(I) the amount that would be necessary to amortize fully, in equal annual installments, by July 1, 1986, the unfunded vested benefits attributable to plan provisions in effect on July 1, 1977 (determined as of the last day of the base plan year); and

"(II) the amount that would be necessary to amortize fully, in equal annual installments, over the period described in subparagraph (C), beginning with the first day of the first plan year beginning on or after the date on which the amendment is adopted, the unfunded vested benefits (determined as of the last day of the base plan year) attributable to each plan amendment after July 1, 1977; and

"(ii) the rate of employer contributions for each subsequent plan year is not less than the lesser of—

"(I) the rate which when multiplied by the valuation contribution base for that subsequent plan year produces the annual amount that would be necessary to complete the amortization schedule described in clause (i), or

"(II) the rate for the plan year immediately preceding such subsequent plan year, plus 5 percent of such rate.

"(C) The period determined under this subparagraph is the lesser of—

"(i) 12 years, or

"(ii) a period equal in length to the average of the remaining expected lives of all persons receiving benefits under the plan.

"(4) Paragraph (1) shall not apply with respect to a plan, other than a plan described in paragraph (3), for the period of consecutive plan years in each of which the plan is in reorganization, beginning with a plan year in which occurs the earlier of the date of the adoption or the effective date of any amendment of the plan which increases benefits with respect to service performed before the plan year in which the adoption of the amendment occurred.

"(e) In determining the minimum contribution requirement with respect to a plan for a plan year under subsection (b), the vested benefits charge may be adjusted to reflect a plan amendment reducing benefits under section 412(c)(8) of the Internal Revenue Code of 1954.

"(f)(1) The Secretary of the Treasury may waive any accumulated funding deficiency under this section in accordance with the provisions of section 303(a).

"(2) Any waiver under paragraph (1) shall not be treated as a waived funding deficiency (within the meaning of section 303(c)).

"(g) For purposes of making any determination under this part, the requirements of section 302(c)(3) shall apply.

"OVERBURDEN CREDIT AGAINST MINIMUM CONTRIBUTION REQUIREMENT

[29 USC § 1424]

"SEC. 4244. (a) For purposes of determining the minimum contribution requirement under section 4243 (before the application of section 4243(b)(2) or (d)) the plan sponsor of a plan which is overburdened for the plan year shall apply an overburden credit against the plan's minimum contribution requirement for the plan year (determined without regard to section 4243(b)(2) or (d) and without regard to this section).

"(b) A plan is overburdened for a plan year if—

"(1) the average number of pay status participants under the plan in the base plan year exceeds the average of the number of active participants in the base plan year and the 2 plan years preceding the base plan year, and

"(2) the rate of employer contributions under the plan equals or exceeds the greater of—

"(A) such rate for the preceding plan year, or

"(B) such rate for the plan year preceding the first year in which the plan is in reorganization.

"(c) The amount of the overburden credit for a plan year is the product of—

"(1) one-half of the average guaranteed benefit paid for the base plan year, and

"(2) the overburden factor for the plan year.

The amount of the overburden credit for a plan year shall not exceed the amount of the minimum contribution requirement for such year (determined without regard to this section).

"(d) For purposes of this section, the overburden factor of a plan for the plan year is an amount equal to—

"(1) the average number of pay status participants for the base plan year, reduced by

"(2) the average of the number of active participants for the base plan year and for each of the 2 plan years preceding the base plan year.

"(e) For purposes of this section—

"(1) The term 'pay status participant' means, with respect to a plan, a participant receiving retirement benefits under the plan.

"(2) The number of active participants for a plan year shall be the sum of—

"(A) the number of active employees who are participants in the plan and on whose behalf contributions are required to be made during the plan year;

"(B) the number of active employees who are not participants in the plan but who are in an employment unit covered by a collective bargaining agreement which requires the employees' employer to contribute to the plan, unless service in such employment unit was never covered under the plan or a predecessor thereof, and

"(C) the total number of active employees attributed to employers who made payments to the plan for the plan year of withdrawal liability pursuant to part 1, determined by dividing—

"(i) the total amount of such payments, by

"(ii) the amount equal to the total contributions received by the plan during the plan year divided by

the average number of active employees who were participants in the plan during the plan year.

The Secretary of the Treasury shall by regulation provide alternative methods of determining active participants where (by reason of irregular employment, contributions on a unit basis, or otherwise) this paragraph does not yield a representative basis for determining the credit.

"(3) The term 'average number' means, with respect to pay status participants for a plan year, a number equal to one-half the sum of—

"(A) the number with respect to the plan as of the beginning of the plan year, and

"(B) the number with respect to the plan as of the end of the plan year.

"(4) The average guaranteed benefit paid is 12 times the average monthly pension payment guaranteed under section 4022A(c)(1) determined under the provisions of the plan in effect at the beginning of the first plan year in which the plan is in reorganization and without regard to section 4022A(c)(2).

"(5) The first year in which the plan is in reorganization is the first of a period of 1 or more consecutive plan years in which the plan has been in reorganization not taking into account any plan years the plan was in reorganization prior to any period of 3 or more consecutive plan years in which the plan was not in reorganization.

"(f)(1) Notwithstanding any other provision of this section, a plan is not eligible for an overburden credit for a plan year if the Secretary of the Treasury finds that the plan's current contribution base for the plan year was reduced, without a corresponding reduction in the plan's unfunded vested benefits attributable to pay status participants, as a result of a change in an agreement providing for employer contributions under the plan.

"(2) For purposes of paragraph (1), a complete or partial withdrawal of an employer (within the meaning of part 1) does not impair a plan's eligibility for an overburden credit, unless

the Secretary of the Treasury finds that a contribution base reduction described in paragraph (1) resulted from a transfer of liabilities to another plan in connection with the withdrawal.

"(g) Notwithstanding any other provision of this section, if 2 or more multiemployer plans merge, the amount of the overburden credit which may be applied under this section with respect to the plan resulting from the merger for any of the 3 plan years ending after the effective date of the merger shall not exceed the sum of the used overburden credit for each of the merging plans for its last plan year ending before the effective date of the merger. For purposes of the preceding sentence, the used overburden credit is that portion of the credit which does not exceed the excess of the minimum contribution requirement (determined without regard to any overburden requirement under this section) over the employer contributions required under the plan.

"ADJUSTMENTS IN ACCRUED BENEFITS

[29 USC § 1425]

"SEC. 4244A. (a)(1) Notwithstanding sections 203 and 204, a multiemployer plan in reorganization may be amended in accordance with this section, to reduce or eliminate accrued benefits attributable to employer contributions which, under section 4022A(b), are not eligible for the corporation's guarantee. The preceding sentence shall only apply to accrued benefits under plan amendments (or plans) adopted after March 26, 1980, or under collective bargaining agreements entered into after March 26, 1980.

"(2) In determining the minimum contribution requirement with respect to a plan for a plan year under section 4243(b), the vested benefits charge may be adjusted to reflect a plan amendment reducing benefits under this section or section 412(c)(8) of the Internal Revenue Code of 1954, but only if the amendment is adopted and effective no later than 2½ months after the end of the plan year, or within such extended period as the Secretary of the Treasury may prescribe by regulation under section 412(c)(10) of such Code.

"(b)(1) Accrued benefits may not be reduced under this section unless—

"(A) notice has been given, at least 6 months before the first day of the plan year in which the amendment reducing benefits is adopted, to—

"(i) plan participants and beneficiaries.

"(ii) each employer who has an obligation to contribute (within the meaning of section 4212(a)) under the plan, and

"(iii) each employee organization which, for purposes of collective bargaining, represents plan participants employed by such an employer,

that the plan is in reorganization and that, if contributions under the plan are not increased, accrued benefits under the plan will be reduced or an excise tax will be imposed on employers;

"(B) in accordance with regulations prescribed by the Secretary of the Treasury—

"(i) any category of accrued benefits is not reduced with respect to inactive participants to a greater extent proportionally than such category of accrued benefits is reduced with respect to active participants,

"(ii) benefits attributable to employer contributions other than accrued benefits and the rate of future benefit accruals are reduced at least to an extent equal to the reduction in accrued benefits of inactive participants, and

"(iii) in any case in which the accrued benefit of a participant or beneficiary is reduced by changing the benefit form or the requirements which the participant or beneficiary must satisfy to be entitled to the benefit, such reduction is not applicable to—

"(I) any participant or beneficiary in pay status on the effective date of the amendment, or the beneficiary of such a participant, or

"(II) any participant show has attained normal retirement age, or who is within 5 years of attaining

normal retirement age, on the effective date of the amendment, or the beneficiary of any such participant; and

"(C) the rate of employer contributions for the plan year in which the amendment becomes effective and for all succeeding plan years in which the plan is in reorganization equals or exceeds the greater of—

"(i) the rate of employer contributions, calculated without regard to the amendment, for the plan year in which the amendment becomes effective, or

"(ii) the rate of employer contributions for the plan year preceding the plan year in which the amendment becomes effective.

"(2) The plan sponsors shall include in any notice required to be sent to plan participants and beneficiaries under paragraph (1) information as to the rights and remedies of plan participants and beneficiaries as well as how to contact the Department of Labor for further information and assistance where appropriate.

"(c) A plan may not recoup a benefit payment which is in excess of the amount payable under the plan because of an amendment retroactively reducing accrued benefits under this section.

"(d)(1)(A) A plan which has been amended to reduce accrued benefits under this section may be amended to increase or restore accrued benefits, or the rate of future benefit accruals, only if the plan is amended to restore levels of previously reduced accrued benefits of inactive participants and of participants who are within 5 years of attaining normal retirement age to at least the same extent as any such increase in accrued benefits or in the rate of future benefit accruals.

"(B) For purposes of this subsection, in the case of a plan which has been amended under this section to reduce accrued benefits—

"(i) an increase in a benefit, or in the rate of future benefit accruals, shall be considered a benefit increase to

the extent that the benefit, or the accrual rate, is thereby increased above the highest benefit level, or accrual rate, which was in effect under the terms of the plan before the effective date of the amendment reducing accrued benefits, and

"(ii) an increase in a benefit, or in the rate of future benefit accruals, shall be considered a benefit restoration to the extent that the benefit, or the accrual rate, is not thereby increased above the highest benefit level, or accrual rate, which was in effect under the terms of the plan immediately before the effective date of the amendment reducing accrued benefits.

"(2) If a plan is amended to partially restore previously reduced accrued benefit levels, or the rate of future benefit accruals, the benefits of inactive participants shall be restored in at least the same proportions as other accrued benefits which are restored.

"(3) No benefit increase under a plan may take effect in a plan year in which an amendment reducing accrued benefits under the plan, in accordance with this section, is adopted or first becomes effective.

"(4) A plan is not required to make retroactive benefit payments with respect to that portion of an accrued benefit which was reduced and subsequently restored under this section.

"(e) For purposes of this section, 'inactive participant' means a person not in covered service under the plan who is in pay status under the plan or who has a nonforfeitable benefit under the plan.

"(f) The Secretary of the Treasury may prescribe rules under which, notwithstanding any other provision of this section, accrued benefit reductions or benefit increases for different participant groups may be varied equitably to reflect variations in contribution rates and other relevant factors reflecting differences in negotiated levels of financial support for plan benefit obligations.

"INSOLVENT PLANS

[29 USC § 1426]

"SEC. 4245. (a) Notwithstanding sections 203 and 204, in any case in which benefit payments under an insolvent multiemployer plan exceed the resource benefit level, any such payments of benefits which are not basic benefits shall be suspended, in accordance with this section, to the extent necessary to reduce the sum of such payments and the payments of such basic benefits to the greater of the resource benefit level or the level of basic benefits, unless an alternative procedure is prescribed by the corporation under section 4022A(g)(5).

"(b) For purposes of this section, for a plan year—

"(1) a multiemployer plan is insolvent if the plan's available resources are not sufficient to pay benefits under the plan when due for the plan year, or if the plan is determined to be insolvent under subsection (d);

"(2) 'resource benefit level' means the level of monthly benefits determined under subsections (c)(1) and (3) and (d)(3) to be the highest level which can be paid out of the plan's available resources;

"(3) 'available resources' means the plan's cash, marketable assets, contributions, withdrawal liability payments, and earnings, less reasonable administrative expenses and amounts owed for such plan year to the corporation under section 4261(b)(2); and

"(4) 'insolvency year' means a plan year in which a plan is insolvent.

"(c)(1) The plan sponsor of a plan in reorganization shall determine in writing the plan's resource benefit level for each insolvency year, based on the plan sponsor's reasonable projection of the plan's available resources and the benefits payable under the plan.

"(2) The suspension of benefit payments under this section shall, in accordance with regulations prescribed by the Secretary of the Treasury, apply in substantially uniform proportions to the benefits of all persons in pay status (within the meaning of section 4241(b)(6)) under the plan, except that the

Secretary of the Treasury may prescribe rules under which benefit suspensions for different participant groups may be varied equitably to reflect variations in contribution rates and other relevant factors including differences in negotiated levels of financial support for plan benefit obligations.

"(3) Notwithstanding paragraph (2), if a plan sponsor determines in writing a resource benefit level for a plan year which is below the level of basic benefits, the payment of all benefits other than basic benefits must be suspended for that plan year.

"(4)(A) If, by the end of an insolvency year, the plan sponsor determines in writing that the plan's available resources in that insolvency year could have supported benefit payments above the resource benefit level for that insolvency year, the plan sponsor shall distribute the excess resources to the participants and beneficiaries who received benefit payments from the plan in that insolvency year, in accordance with regulations prescribed by the Secretary of the Treasury.

"(B) For purposes of this paragraph, the term 'excess resources' means available resources above the amount necessary to support the resource benefit level, but no greater than the amount necessary to pay benefits for the plan year at the benefit levels under the plan.

"(5) If, by the end of an insolvency year, any benefit has not been paid at the resource benefit level, amounts up to the resource benefit level which were unpaid shall be distributed to the participants and beneficiaries, in accordance with regulations prescribed by the Secretary of the Treasury, to the extent possible taking into account the plan's total available resources in that insolvency year.

"(6) Except as provided in paragraph (4) or (5), a plan is not required to make retroactive benefit payments with respect to that portion of a benefit which was suspended under this section.

"(d)(1) As of the end of the first plan year in which a plan is in reorganization, and at least every 3 plan years thereafter

(unless the plan is no longer in reorganization), the plan sponsor shall compare the value of plan assets (determined in accordance with section 4243(b)(3)(B)(ii)) for that plan year with the total amount of benefit payments made under the plan for that plan year. Unless the plan sponsor determines that the value of plan assets exceeds 3 times the total amount of benefit payments, the plan sponsor shall determine whether the plan will be insolvent in any of the next 3 plan years.

"(2) If, at any time, the plan sponsor of a plan in reorganization reasonably determines, taking into account the plan's recent and anticipated financial experience, that the plan's available resources are not sufficient to pay benefits under the plan when due for the next plan year, the plan sponsor shall make such determination available to interested parties.

"(3) The plan sponsor of a plan in reorganization shall determine in writing for each insolvency year the resource benefit level and the level of basic benefits no later than 3 months before the insolvency year.

"(e)(1) If the plan sponsor of a plan in reorganization determines under subsection (d)(1) or (2) that the plan may become insolvent (within the meaning of subsection (b)(1)), the plan sponsor shall—

"(A) notify the Secretary of the Treasury, the corporation, the parties described in section 4242(a)(2), and the plan participants and beneficiaries of that determination, and

"(B) inform the parties described in section 4242(a)(2) and the plan participants and beneficiaries that if insolvency occurs certain benefit payments will be suspended, but that basic benefits will continue to be paid.

"(2) No later than 2 months before the first day of each insolvency year, the plan sponsor of a plan in reorganization shall notify the Secretary of the Treasury, the corporation, and the parties described in paragraph (1)(B) of the resource benefit level determined in writing for that insolvency year.

"(3) In any case in which the plan sponsor anticipates that the resource benefit level for an insolvency year may not exceed the level of basic benefits, the plan sponsor shall notify the corporation.

"(4) Notice required by this subsection shall be given in accordance with regulations prescribed by the corporation, except that notice to the Secretary of the Treasury shall be given in accordance with regulations prescribed by the Secretary of the Treasury.

"(5) The corporation may prescribe a time other than the time prescribed by this section for the making of a determination or the filing of a notice under this section.

"(f)(1) If the plan sponsor of an insolvent plan, for which the resource benefit level is above the level of basic benefits, anticipates that, for any month in an insolvency year, the plan will not have funds sufficient to pay basic benefits, the plan sponsor may apply for financial assistance from the corporation under section 4261.

"(2) A plan sponsor who has determined a resource benefit level for an insolvency year which is below the level of basic benefits shall apply for financial assistance from the corporation under section 4261.

"PART 4—FINANCIAL ASSISTANCE

"FINANCIAL ASSISTANCE

[29 USC § 1431]

SEC. 4261. (a) If, upon receipt of an application for financial assistance under section 4245(f) or section 4281(d), the corporation verifies that the plan is or will be insolvent and unable to pay basic benefits when due, the corporation shall provide the plan financial assistance in an amount sufficient to enable the plan to pay basic benefits under the plan.

(b)(1) Financial assistance shall be provided under such conditions as the corporation determines are equitable and are appropriate to prevent unreasonable loss to the corporation with respect to the plan.

"(2) A plan which has received financial assistance shall repay the amount of such assistance to the corporation on reasonable terms consistent with regulations prescribed by the corporation.

"(c) Pending determination of the amount described in subsection (a), the corporation may provide financial assistance in such amounts as it considers appropriate in order to avoid undue hardship to plan participants and beneficiaries.

"PART 5—BENEFITS AFTER TERMINATION

"BENEFITS UNDER CERTAIN TERMINATED PLANS

[29 USC § 1441]

SEC. 4281. (a) Notwithstanding sections 203 and 204, the plan sponsor of a terminated multiemployer plan to which section 4041A(d) applies shall amend the plan to reduce benefits, and shall suspend benefit payments, as required by this section.

(b)(1) The value of nonforfeitable benefits under a terminated plan referred to in subsection (a), and the value of the plan's assets, shall be determined in writing, in accordance with regulations prescribed by the corporation, as of the end of the plan year during which section 4041A(d) becomes applicable to the plan, and each plan year thereafter.

(2) For purposes of this section, plan assets include outstanding claims for withdrawal liability (within the meaning of section 4001(a)(12)).

(c)(1) If, according to the determination made under subsection (b), the value of nonforfeitable benefits exceeds the value of the plan's assets, the plan sponsor shall amend the plan to reduce benefits under the plan to the extent necessary to ensure that the plan's assets are sufficient, as determined and certified in accordance with regulations prescribed by the corporation, to discharge when due all of the plan's obligations with respect to nonforfeitable benefits.

"(2) Any plan amendment required by this subsection shall, in accordance with regulations prescribed by the Secretary of the Treasury—

"(A) reduce benefits only to the extent necessary to comply with paragraph (1);

"(B) reduce accrued benefits only to the extent that those benefits are not eligible for the corporation's guarantee under section 4022A(b);

"(C) comply with the rules for and limitations on benefit reductions under a plan in reorganization, as prescribed in section 4244A, except to the extent that the corporation prescribes other rules and limitations in regulations under this section; and

"(D) take effect no later than 6 months after the end of the plan year for which it is determined that the value of nonforfeitable benefits exceeds the value of the plan's assets.

"(d)(1) In any case in which benefit payments under a plan which is insolvent under paragraph (2)(A) exceed the resource benefit level, any such payments which are not basic benefits shall be suspended, in accordance with this subsection, to the extent necessary to reduce the sum of such payments and such basic benefits to the greater of the resource benefit level or the level of basic benefits, unless an alternative procedure is prescribed by the corporation in connection with a supplemental guarantee program established under section 4022A(g)(2).

"(2) For purposes of this subsection, for a plan year—

"(A) a plan is insolvent if—

"(i) the plan has been amended to reduce benefits to the extent permitted by subsection (c), and

"(ii) the plan's available resources are not sufficient to pay benefits under the plan, when due for the plan year; and

"(B) 'resource benefit level' and 'available resources' have the meanings set forth in paragraphs (2) and (3), respectively, of section 4245(b).

"(3) The plan sponsor of a plan which is insolvent (within the meaning of paragraph (2)(A)) shall have the powers and duties of the plan sponsor of a plan in reorganization which is insolvent (within the meaning of section 4245(b)(1)), except that regulations governing the plan sponsor's exercise of those powers and duties under this section shall be prescribed by the corporation, and the corporation shall prescribe by regulation notice requirements which assure that plan participants and beneficiaries receive adequate notice of benefit suspensions.

"(4) A plan is not required to make retroactive benefit payments with respect to that portion of a benefit which was suspended under this subsection, except that the provisions of section 4245(c)(4) and (5) shall apply in the case of plans which are insolvent under paragraph (2)(A), in connection with the plan year during which such section 4041A(d) first became applicable to the plan and every year thereafter, in the same manner and to the same extent as such provisions apply to insolvent plans in reorganization under section 4245, in connection with insolvency years under such section 4245.

"PART 6—ENFORCEMENT

"CIVIL ACTIONS

[29 USC § 1451]

SEC. 4301. (a)(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed

shall be treated in the same manner as a delinquent contribution (within the meaning of section 515).

"(c) The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

"(d) An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

"(e) In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

"(f) An action under this section may not be brought after the later of—

"(1) 6 years after the date on which the cause of action arose, or

"(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

"(g) A copy of the complaint in any action under this section or section 4221 shall be served upon the corporation by certified mail.

The corporation may intervene in any such action.

"PENALTY FOR FAILURE TO PROVIDE NOTICE

[29 USC § 1452]

SEC. 4302. Any person who fails, without reasonable cause, to provide a notice required under this subtitle or any

implementing regulations shall be liable to the corporation in an amount up to $100 for each day for which such failure continues. The corporation may bring a civil action against any such person in the United States District Court for the District of Columbia or in any district court of the United States within the jurisdiction of which the plan assets are located, the plan is administered, or a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

SEC. 105. PREMIUMS.

[29 USC § 1306]

(a) Section 4006(a) is amended to read as follows:

(a)(1) The corporation shall prescribe such schedules of premium rates and bases for the application of those rates as may be necessary to provide sufficient revenue to the fund for the corporation to carry out its functions under this title. The premium rates charged by the corporation for any period shall be uniform for all plans, other than multiemployer plans, insured by the corporation with respect to basic benefits guaranteed by it under section 4022, and shall be uniform for all multiemployer plans with respect to basic benefits guaranteed by it under section 4022A. In establishing annual premiums with respect to plans, other than multiemployer plans, paragraphs (5) and (6) of this subsection (as in effect before the enactment of the Multiemployer Pension Plan Amendments Act of 1980) shall continue to apply.

"(2) The corporation shall maintain separate schedules of premium rates, and bases for the application of those rates, for—

"(A) basic benefits guaranteed by it under section 4022 for single-employer plans,

"(B) basic benefits guaranteed by it under section 4022A for multiemployer plans,

"(C) nonbasic benefits guaranteed by it under section 4022 for single-employer plans,

"(D) nonbasic benefits guaranteed by it under section 4022A for multiemployer plans, and

"(E) reimbursements of uncollectible withdrawal liability under section 4222.

The corporation may revise such schedules whenever it determines that revised schedules are necessary. Except as provided in section 4022A(f), in order to place a revised schedule described in subparagraph (A) or (B) in effect, the corporation shall proceed in accordance with subsection (b)(1), and such schedule shall apply only to plan years beginning more than 30 days after the date on which the Congress approves such revised schedule by a concurrent resolution.

"(3)(A) Except as provided in subparagraph (C), the annual premium rate payable to the corporation by all plans for basic benefits guaranteed under this title is—

"(i) in the case of a single-employer plan, for plan years beginning after December 31, 1977, an amount equal to $2.60 for each individual who is a participant in such plan during the plan year;

"(ii) in the case of a multiemployer plan, for the plan year within which the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980 falls, an amount for each individual who is a participant in such plan for such plan year equal to the sum of—

"(I) 50 cents, multiplied by a fraction the numerator of which is the number of months in such year ending on or before such date and the denominator of which is 12, and

"(II) $1.00, multiplied by a fraction equal to 1 minus the fraction determined under clause (i),

"(iii) in the case of a multiemployer plan, for plan years beginning after the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980, an amount equal to—

"(I) $1.40 for each participant, for the first, second, third, and fourth plan years,

"(II) $1.80 for each participant, for the fifth and sixth plan years,

"(III) $2.20 for each participant, for the seventh and eighth plan years, and

"(IV) $2.60 for each participant, for the ninth plan year, and for each succeeding plan year.

"(B) The corporation may prescribe by regulation the extent to which the rate described in subparagraph (A)(i) applies more than once for any plan year to an individual participating in more than one plan maintained by the same employer, and the corporation may prescribe regulations under which the rate described in subparagraph (A)(iii) will not apply to the same participant in any multiemployer plan more than once for any plan year.

"(C)(i) If the sum of—

"(I) the amounts in any fund for basic benefits guaranteed for multiemployer plans, and

"(II) the value of any assets held by the corporation for payment of basic benefits guaranteed for multiemployer plans, is for any calendar year less than 2 times the amount of basic benefits guaranteed by the corporation under this title for multiemployer plans which were paid out of any such fund or assets during the preceding calendar year, the annual premium rates under subparagraph (A) shall be increased to the next highest premium level necessary to insure that such sum will be at least 2 times greater than such amount during the following calendar year.

"(ii) If the board of directors of the corporation determines that an increase in the premium rates under subparagraph (A) is necessary to provide assistance to plans which are receiving assistance under section 4261 and to plans the board finds are reasonably likely to require such assistance, the board may order such increase in the premium rates.

"(iii) The maximum annual premium rate which may be established under this subparagraph is $2.60 for each participant.

"(iv) The provisions of this subparagraph shall not apply if the annual premium rate is increased to a level in excess of $2.60 per participant under any other provisions of this title.

"(D)(i) Not later than 120 days before the date on which an increase under subparagraph (C)(ii) is to become effective, the corporation shall publish in the Federal Register a notice of the determination described in subparagraph (C)(ii), the basis for the determination, the amount of the increase in the premium, and the anticipated increase in premium income that would result from the increase in the premium rate. The notice shall invite public comment, and shall provide for a public hearing if one is requested. Any such hearing shall be commenced not later than 60 days before the date on which the increase is to become effective.

"(ii) The board of directors shall review the hearing record established under clause (i) and shall, not later than 30 days before the date on which the increase is to become effective, determine (after consideration of the comments received) whether the amount of the increase should be changed and shall publish its determination in the Federal Register.

"(4) The corporation may prescribe, subject to approval by the Congress in accordance with this section or section 4022A(f), alternative schedules of premium rates, and bases for the application of those rates, for basic benefits guaranteed by it under sections 4022 and 4022A based, in whole or in part, on the risks insured by the corporation in each plan.

"(5)(A) In carrying out its authority under paragraph (1) to establish schedules of premium rates, and bases for the application of those rates, for nonbasic benefits guaranteed under sections 4022 and 4022A, the premium rates charged by the corporation for any period for nonbasic benefits guaranteed shall—

"(i) be uniform by category of nonbasic benefits guaranteed,

"(ii) be based on the risks insured in each category, and

"(iii) reflect the experience of the corporation (including experience which may be reasonably anticipated) in guaranteeing such benefits.

"(B) Notwithstanding subparagraph (A), premium rates charged to any multiemployer plan by the corporation for any period for supplemental guarantees under section 4022A(g)(2) may reflect any reasonable considerations which the corporation determines to be appropriate."

(b) Section 4006(b) is amended—

(1) by striking out "Committee on Labor and Public Welfare" each place it appears and inserting in lieu thereof "Committee on Labor and Human Resources";

(2) in paragraph (1)—

(A) by striking out "coverage"; and

(B) by striking out "(B) or (C)" and inserting in lieu thereof "(C), (D), or (E)"; and

(3) in paragraph (3), by striking out "coverage".

[29 USC § 1306]

(c) Section 4006 is further amended by adding at the end thereof the following new subsection:

"(c)(1) Except as provided in subsection (a)(3), and subject to paragraph (2), the rate for all plans for basic benefits guaranteed under this title with respect to plan years ending after September 2, 1974, is—

"(A) in the case of each plan which was not a multiemployer plan in a plan year, an amount equal to $1 for each individual who was a participant in such plan during the plan year, and

"(B) in the case of each plan which was a multiemployer plan in a plan year, an amount equal to 50 cents for each individual who was a participant in such plan during the plan year.

"(2) The rate applicable under this subsection for the plan year preceding September 1, 1975, is the product of—

"(A) the rate described in the preceding sentence; and

"(B) a fraction—

"(i) the numerator of which is the number and calendar months in the plan year which ends after September 2, 1974, and before the date on which the new plan year commences, and

"(ii) the denominator of which is 12."

SEC. 106. ANNUAL REPORT OF PLAN ADMINISTRATOR.

[29 USC § 1365]

Section 4065 is amended—

(1) in paragraph (1), by striking out "and";

(2) in paragraph (2), by striking out the period and inserting in lieu thereof "except to the extent the corporation waives such requirement, and"; and

(3) by adding after paragraph (2) the following new paragraph:

"(3) in the case of a multiemployer plan, information with respect to such plan which the corporation determines is necessary for the enforcement of subtitle E and requires by regulation, which may include—

"(A) a statement certified by the plan's enrolled actuary of—

"(i) the value of all vested benefits under the plan as of the end of the plan year, and

"(ii) the value of the plan's assets as of the end of the plan year;

"(B) a statement certified by the plan sponsor of each claim for outstanding withdrawal liability (within the meaning of section 4001(a)(12)) and its value as of the end of that plan year and as of the end of the preceding plan year; and

"(C) the number of employers having an obligation to contribute to the plan and the number of employers required to make withdrawal liability payments.".

SEC. 107. CONTINGENT EMPLOYER LIABILITY INSURANCE.

[29 USC § 1323]

Section 4023 (as in effect immediately before the date of the enactment of this Act) is repealed.

SEC. 108. TRANSITION RULES AND EFFECTIVE DATES.

(a) Sections 4081 and 4082 are redesignated as sections 4401 and 4402, respectively,

[29 USC § 1461]

(b) Section 4402 (as redesignated) is amended by striking out subsection (d) and inserting in lieu thereof the following new subsection:

"(d) Notwithstanding any other provision of this title, guaranteed benefits payable by the corporation pursuant to its discretionary authority under this section shall continue to be paid at the level guaranteed under section 4022, without regard to any limitation on payment under subparagraph (C) or (D) of subsection (c)(4).".

(c)(1) Section 4402 (as redesignated) is further amended by striking out subsection (e) and adding in lieu thereof the following new subsections:

"(e)(1) Except as provided in paragraphs (2), (3), and (4), the amendments to this Act made by the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on the date of the enactment of that Act.

"(2)(A) Except as provided in this paragraph, part 1 of subtitle E, relating to withdrawal liability, takes effect on April 29, 1980.

"(B) For purposes of determining withdrawal liability under part 1 of subtitle E, an employer who has withdrawn from a plan shall be considered to have withdrawn from a multiemployer plan if, at the time of the withdrawal, the plan was a

multiemployer plan as defined in section 4001(a)(3) as in effect at the time of the withdrawal.

"(3) Sections 4241 through 4245, relating to multiemployer plan reorganization, shall take effect, with respect to each plan, on the first day of the first plan year beginning on or after the earlier of—

"(A) the date on which the last collective bargaining agreement providing for employer contributions under the plan, which was in effect on the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, expires, without regard to extensions agreed to on or after the date of the enactment of that Act, or

"(B) 3 years after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980.

"(4) Section 4235 shall take effect on April 29, 1980.

"(f)(1) In the event that before the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980, the corporation has determined that—

"(A) an employer has withdrawn from a multiemployer plan under section 4063, and

"(B) the employer is liable to the corporation under such section,

the corporation shall retain the amount of liability paid to it or furnished in the form of a bond and shall pay such liability to the plan in the event the plan terminates in accordance with section 4041A(a)(2) before the earlier of April 29, 1985, or the day after the 5-year period commencing on the date of such withdrawal.

"(2) In any case in which the plan is not so terminated within the period described in paragraph (1), the liability of the employer is abated and any payment held in escrow shall be refunded without interest to the employer or the employer's bond shall be cancelled.

"(g)(1) In any case in which an employer or employers withdrew from a multiemployer plan before the effective date of part 1 of subtitle E, the corporation may—

"(A) apply section 4063(d), as in effect before the amendments made by the Multiemployer Pension Plan Amendments Act of 1980, to such plan,

"(B) assess liability against the withdrawn employer with respect to the resulting terminated plan.

"(C) guarantee benefits under the terminated plan under section 4022, as in effect before such amendments, and

"(D) if necessary, enforce such action through suit brought under section 4003.

"(2) The corporation shall use the revolving fund used by the corporation with respect to basic benefits guaranteed under section 4022A in guaranteeing benefits under a terminated plan described in this subsection."

[29 USC § 1385 note]

(2)(A) For the purpose of applying section 4205 of the Employee Retirement Income Security Act of 1974 in the case of an employer described in subparagraph (B)—

(i) "more than 75 percent" shall be substituted for "70 percent" in subsections (a) and (b) of such section.

(ii) "25 percent or less" shall be substituted for "30 percent" in subsection (b) of such section, and

(iii) the number of contribution units for the high base year shall be the average annual number of such units for calendar years 1970 and 1971.

(B) An employer is described in this subparagraph if—

(i) the employer is engaged in the trade or business of shipping bulk cargoes in the Great Lakes Maritime Industry, and whose fleet consists of vessels the gross registered tonnage of which was at least 7,800, as stated in the American Bureau of Shipping Record, and

(ii) whose fleet during any 5 years from the period 1970 through and including 1979 has experienced a 33 percent or more increase in the contribution units as measured from the average annual contribution units for he calendar years 1970 and 1971.

[29 USC § 1426 note]

(3)(A) For the purpose of determining the withdrawal liability of an employer under title IV of the Employee Retirement Income Security Act of 1974 from a plan that terminates while the plan is insolvent (within the meaning of section 4245 of such Act), the plan's unfunded vested benefits shall be reduced by an amount equal to the sum of all overburden credits that were applied in determining the plan's accumulated funding deficiency for all plan years preceding the first plan year in which the plan is insolvent, plus interest thereon.

(B) The provisions of subparagraph (A) apply only if—

(i) the plan would have been eligible for the overburden credit in the last plan year beginning before the date of the enactment of this Act, if section 4243 of the Employee Retirement Income Security Act of 1974 had been in effect for that plan year, and

(ii) the Pension Benefit Guaranty Corporation determines that the reduction of unfunded vested benefits under subparagraph (A) would not significantly increase the risk of loss to the corporation.

[29 USC § 1381 note]

(4) In the case of an employer who withdrew before the date of enactment of this Act from a multiemployer plan covering employees in the seagoing industry (as determined by the corporation), sections 4201 through 4219 of the Employee Retirement Income Security Act of 1974, as added by this Act, are effective as of May 3, 1979. For the purpose of applying section 4217 for purposes of the preceding sentence, the date "May 2, 1979," shall be substituted for "April 28, 1980," and the date "May 3, 1979" shall be substituted for "April 29, 1980." For purposes of this paragraph, terms which are used in title IV of

the Employee Retirement Income Security Act of 1974, or in regulations prescribed under that title, and which are used in the preceding sentence have the same meaning as when used in that Act or those regulations. For purposes of this paragraph, the term "employer" includes only a substantial employer covering employees in the seagoing industry (as so determined) in connection with ports on the West Coast of the United States, but does not include an employer who withdrew from a plan because of a change in collective bargaining representative.

[29 USC § 1385 note]

(d) For purposes of section 4205 of the Employee Retirement Income Security Act of 1974—

(1) subsection (a)(1) of such section shall not apply to any plan year beginning before April 29, 1982,

(2) subsection (a)(2) of such section shall not apply with respect to any cessation of contribution obligations occurring before April 29, 1980, and

(3) in applying subsection (b) of such section, the employer's contribution base units for any plan year ending before April 29, 1980, shall be deemed to be equal to the employer's contribution base units for the last plan year ending before such date.

[29 USC § 1385 note]

(e)(1) In the case of a partial withdrawal under section 4205 of the Employee Retirement Income Security Act of 1974, an employer who—

(A) before December 13, 1979, had publicly announced the total cessation of covered operations at a facility in a State (and such cessation occurred within 12 months after the announcement),

(B) had not been obligated to make contributions to the plan on behalf of the employees at such facility for more than 8 years before the discontinuance of contributions, and

(C) after the discontinuance of contributions does not within 1 year after the date of the partial withdrawal perform work in the same State of the type for which contributions were previously required,

shall be liable under such section with respect to such partial withdrawal in an amount not greater than the amount determined under paragraph (2).

(2) The amount determined under this paragraph is the excess (if any) of—

(A) the present value (on the withdrawal date) of the benefits under the plan which—

(i) were vested on the withdrawal date (or, if earlier, at the time of separation from service with the employer at the facility),

(ii) were accrued by employees who on December 13, 1979 (or, if earlier, at the time of separation from service with the employer at the facility), were employed at the facility, and

(iii) are attributable to service with the withdrawing employer, over

(B)(i) the sum of—

(I) all employer contributions to the plan o behalf of employees at the facility before the withdrawal date.

(II) interest (to the withdrawal date) on amounts described in subclause (I), and

(III) $100,000, reduced by

(ii) the sum of—

(I) the benefits paid under the plan on or before the withdrawal date with respect to former employees who separated from employment at the facility, and

(II) interest (to the withdrawal date) on amounts described in subclause (I).

(3) For purposes of paragraph (2)—

(A) actuarial assumptions shall be those used in the last actuarial report completed before December 13, 1979,

(B) the term "withdrawal date" means the date on which the employer ceased work at the facility of the type for which contributions were previously required, and

(C) the term "facility" means the facility referred to in paragraph (1).

(f) Title IV is amended by adding at the end thereof the following new section:

"ELECTION OF PLAN STATUS

[29 USC § 1453]

"SEC. 4303. (a) Within one year after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, a multiemployer plan may irrevocably elect, pursuant to procedures established by the corporation, that the plan shall not be treated as a multiemployer plan for any purpose under this Act or the Internal Revenue Code of 1954, if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980—

"(1) the plan was not a multiemployer plan because the plan was not a plan described in section 3(37)(A)(iii) of this Act and section 414(f)(1)(C) of the Internal Revenue Code of 1954 (as such provisions were in effect on the day before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980); and

"(2) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the corporation, the Secretary of Labor and the Secretary of the Treasury.

"(b) An election described in subsection (a) shall be effective only if—

"(1) the plan is amended to provide that it shall not be treated as a multiemployer plan for all purposes under this Act and the Internal Revenue Code of 1954, and

"(2) written notice of the amendment is provided to the corporation within 60 days after the amendment is adopted.

"(c) An election described in subsection (a) shall be treated as being effective as of the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980."

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

C.A. No. 82-0919-A

REPUBLIC INDUSTRIES, INC.,

Plaintiff,

vs.

TEAMSTERS JOINT COUNCIL NO. 83 OF VIRGINIA PENSION FUND,

Defendant.

AFFIDAVIT OF R. B. RISS IN SUPPORT OF A MOTION FOR PRELIMINARY INJUNCTION

State of Missouri)
County of Jackson) ss.:

1. My name is Robert B. Riss. I submit this affidavit in support of the Motion for Preliminary Injunction in the above-captioned case.

2. Until the dissolution of Johnson Motor Lines, Inc. ("JML") more fully described below, I was Chairman of the Board of JML and I am Chairman of the Board and Chief Executive Officer of Republic Industries, Inc. ("Republic") which is a family-owned corporation with its principal office in Kansas City, Missouri.

3. I graduated from the University of Kansas in 1949 with a Bachelor of Science Degree in Business Administration. I have been active in the motor carrier industry all of my working life, serving in executive capacities. I have also been active in the banking industry, having been elected to the Board of Directors of the American Trust Company in New York in 1956; Chairman of the Board of Grandview Bank and Trust Company

of Missouri in 1969; and elected to the Board of Directors of United Missouri Bank in 1978. This bank has more than one billion dollars in assets.

4. In other financial areas, I served on the Finance Committee and Executive Committee of ERC Corporation, which is a holding company for casualty and life insurance companies. These committees had responsibility for establishing guidelines for the management of approximately one billion dollars in the investment portfolio and the investment of approximately 150 million dollars a year in cash flow.

5. Also, I serve as Vice Chairman of the Board of Trustees of the Kansas University Endowment Association and its Executive Committee, which supervises the Association's 100 million dollar portfolio of assets.

ACQUISITION OF JOHNSON MOTOR LINES, INC. BY REPUBLIC INDUSTRIES, INC.

6. I was a member of the Johnson Motor Lines, Inc. (JML) Board of Directors from 1962 until 1981, although the extent of my involvement with JML until 1979 was limited to attendance at regular board meetings, and I had no role in the daily management or operations of the company. I am personally familiar with the facts hereafter set out in this affidavit and participated in all of the transactions and negotiations described herein.

7. Republic Industries, Inc. purchased 50 shares of JML's outstanding stock in October 1974, and another 40.88 shares in July of 1975, giving it approximately 3⅓ percent of the outstanding stock of JML as a result of the two purchases.

8. H. Beale Rollins, Founder and Chairman of JML, had always owned a substantial majority of JML's outstanding shares. I know, from my years of association with him and from discussions and negotiations with him, which led ultimately to Republic's acquisition of control of JML, that he had been, for many years, a major benefactor the McDonogh School (a school for indigent boys) in Baltimore, Maryland. At one time the

school held approximately 27% of JML's outstanding stock. When McDonogh informed Rollins that it needed funds to finance various capital improvements and operating programs, McDonogh, at Rollins' suggestion, sold the JML stock to various officers and supervisory personnel of JML.

9. In the intervening years prior to 1978 JML's operating results were inconsistent, at best. No dividends were declared, and the company was clearly not a favorable candidate for a public offering. In late 1977 and early 1978, several minority stockholders told me of their increasing concern over this situation, especially since many reportedly had borrowed extensively to finance their stock purchases from McDonogh. At the same time, Rollins told me of his concern about his own estate planning and about his continuing ability to make the major gifts to McDonogh that he had intended.

10. After an extensive evaluation of JML and in complete reliance on the audited financial statement of the company and the representations of Rollins and its officers, Republic agreed, on May 4, 1978, to purchase the 96-plus percent of JML's outstanding stock held by Rollins and the minority shareholders.

11. We were optimistic that JML's operations could be expanded from the Southeast into other geographical areas that carried a much higher rate basis, and that the implementation of an aggressive sales program in those areas would take full advantage of such expansion. We felt that JML had excellent terminal locations and a good field staff, and that with this foundation, a profitable operation could be established.

12. To implement this concept, an office building in Kansas City was purchased and renovated to house the dual general office functions of Republic and JML. Additionally, sites and facilities were acquired to accommodate expanded and new terminal operations, in Chicago, Illinois; Woodbridge, New Jersey; Dallas, Texas; and other places.

STRUCTURE OF ACQUISITION

13. Republic agreed with all shareholders that it would purchase their stock at the book value per share as indicated in JML's audited statements dated December 31, 1977, prepared and certified by Arthur Young & Company.

14. Republic entered into purchase agreements with both Rollins and the minority shareholders on May 5, 1978. The purchase of the minority interests was consummated shortly thereafter, and was financed through a loan from the North Carolina National Bank (NCNB) to Republic. Republic then owned a fraction more than 30% of JML's outstanding stock. Republic's acquisition debt represented the first significant long-term debt ever incurred by Republic.

15. It was necessary for Republic to obtain approval of the Interstate Commerce Commission ("ICC") for the acquisition of Rollins' majority interest. Republic's July 1978 applications to the Interstate Commerce Commission for control of JML, and for the authority to issue notes for the balance of the purchase price of JML, were approved by the ICC March 16, 1979 (Docket No. MC-F-13659). Republic's control of JML and ownership of 100% of its stock was consummated June 14, 1979, and Republic then issued its promissory notes in accordance with ICC approval.

16. We had executed building contracts to purchase JML in 1978, more than two years prior to the enactment of MPPAA. And, as of June 1979, the only pension liability of JML of any kind of which I and, to the best of my knowledge, any other officer or director of Republic or Johnson, was aware involved required payments to the various multi-employer funds in the amounts specified in the labor contracts, and to JML's single employer plan for certain non-unionized employees.

JML OPERATING DIFFICULTIES

17. During 1979, JML's pre-existing operating difficulties and inconsistencies were compounded by several factors.

Seventy-three percent of its tonnage moved at rates in tariffs established by the Southern Motor Carriers Rate Conference. These rates were traditionally among the lowest in the nation, while JML's labor costs under the National Master Freight Agreement with the Teamsters Union, and various local agreements, attained the same approximate levels as those found in geographic territories enjoying a much higher rate base.

18. Additionally, as time went on, the impact of the recession was keenly felt by JML, due to the very narrow profit margins occasioned by the unfavorable rate base/labor cost relationship. JML additionally was competing with a number of non-union motor carriers which severely hampered its ability to maintain even the existing rate levels. During the second half of 1979, JML eliminated a great deal of overhead in its General Office, and initiated terminal reductions and closings in a number of areas, including Virginia, where we closed our Union-covered General Commodity Terminal on November 2, 1979. While so doing, we agreed with the Union to hire five senior employees from that terminal for work at our separate long established special commodity terminal in the Richmond area.

19. During this period, JML was continually evaluating its operations and formulating a detailed analysis of four possible alternatives available to it in 1980. They were:

(1) Complete shut-down of the entire operation.

(2) Continue operation, but with the use of owner operators (drivers who owned their own vehicles) as line-haul drivers. This would allow out-of-pocket savings on equipment costs and driver compensation through increased efficiency and productivity, and the elimination of costly work rules. JML's pick up, delivery, and cross-dock transfer operations would have remained intact. This alternative was dependent however upon union consent and relief from the collectively bargained agreements then in force.

(3) Continue the reductions in operations with the idea of limiting losses until such time as the economy might improve and the operation could expand.

(4) Revert to a purely truckload operation. This would eliminate the need for terminal dock facilities, dock personnel, and equipment, and would simplify JML's operation and paper flow, since the number of shipments per day would be drastically reduced. Union personnel would continue to perform the over-the-road line-haul function.

As described below, we ultimately concluded that we had no choice but to select the first of these alternatives.

RELATIONSHIP WITH FINANCIAL INSTITUTIONS

20. Prior to acquisition of JML by Republic, JML had a longstanding relationship with North Carolina National Bank (NCNB) and Teachers Insurance Annuity Association (TIAA). JML had a line of credit of $10 million with NCNB, and a debt balance with TIAA of 3.5 million dollars. The TIAA debt was serviced at a rate of 8 percent on the outstanding balance and required annual principal payments of $500,000. These were fairly standard agreements. They were unsecured, but contained fairly restrictive covenants as to debt-equity ratios, lease debt, and fixed charges.

21. Upon making the decision to purchase JML, Republic negotiated a line of credit with NCNB for 7.5 million dollars and signed the loan agreement on June 15, 1979. The proceeds from this loan were used primarily to pay off the minority stockholders of JML. The total cost to Republic of acquiring 100 percent of JML's stock was $16,829,000. Republic then had no direct relationship with TIAA. During the latter half of 1979, the lenders became concerned about the position of JML and asked Republic to act as an additional borrower and guarantor of Johnson's debt. Because the lenders could have otherwise called the loans, Republic did so in April 1980. These two agreements then represented (1) a consolidated line of credit with NCNB of $17.5 million in the name of Republic, and

(2) Republic's guarantee of the performance and payment by JML of the TIAA loan for approximately 3 million dollars.

22. By the first week of June 1980, it had become obvious that Republic would be in violation of certain of the debt covenants in the two agreements, due to the very poor performance of JML in the second quarter. The lending institutions were notified of this situation, and requested a lender's meeting on July 15, 1980 in New York City.

23. Although nothing definite was decided at the July 15 meeting, the lenders made it clear that they were extremely concerned and were considering requiring Republic to collaterize (secure) the loans. The lenders also had the option of accelerating, or demanding in full, the payment of the outstanding sums. The possibility of the sale of JML was also discussed.

24. To make matters worse for Johnson and other high labor cost carriers, the President approved, on July 1, 1980, the Motor Carrier Act of 1980, which fosters price competition among interstate motor carriers. The situation in the trucking industry is even worse today.

FINAL EVALUATION MEETING

25. A final meeting to determine a course of action was held in Kansas City the last week in July 1980. Among those present were JML's President, Jerry Armstrong, and Gene Henderson, its Vice President, Transportation and Labor Relations. It had become obvious that a drastic move of some kind must be made in order to salvage the steadily deteriorating financial situation, that now involved Republic, as well as JML. Interest rate increases had virtually exhausted JML's and Republic's debt servicing capacities, and JML's exceedingly poor operating results during the first half of 1980 permitted stockholders and lenders alike only a very grim outlook on JML's condition and future prospects.

26. We were unable to obtain the necessary relief required for Johnson to pursue Alternative (2), mentioned in Paragraph

19 above. JML's executives had assured Republic that they had done everything in their power to improve JML's operating results, but were simply unable to overcome the unfavorable rate base/labor cost relationship. Their problem was emphasized when Overnite Transportation Company, a large, publicly held, non-union competitor reduced its freight rates by 10 percent.

27. Republic's officers approached two large companies concerning a possible sale of Johnson, and while both expressed some interest, further discussions proved futile.

28. Alternatives #3 and #4 (Paragraph 19) were determined to involve more risk and more monetary loss than a complete close-down of the operation.

29. Having no other alternative, JML announced on July 30, 1980, that it was ceasing operations, and that there would be no pick up service provided after August 8, 1980 (Attachment A).

30. At no time during the evaluation process, or before termination of JML's operation, did any one mention to me or, so far as I am aware, to any officer or director of JML or Republic the possibility that either JML or Republic would become subject to withdrawal liability under the MPPAA. No such liability entered. or could have entered, into our determination to close JML because we were totally unaware of any such possibility. No advice was given to us either by our accountants or lawyers to suggest that any such liability did or might exist. The MPPAA of course had not even been enacted into law. It is obvious, given the size of the withdrawal liability claims now asserted against us, that we would have opted for one of the alternatives rejected in August 1980, in preference to a complete close-down of JML, had we known then what we know now about the withdrawal liability provisions of the MPPAA.

31. At no time, before or after August 8, 1980, until October of that year, did any officer or director of Republic or, to the best of my knowledge, any officer or director of JML, have

knowledge that the MPPAA might or would be or had been enacted, or that JML might be subjected to any withdrawal liability claim from any multi-employer pension fund.

32. Meanwhile from August 11, 1980 forward, the orderly liquidation of JML proceeded, involving primarily an auction of parts and equipment and the sale of real estate. The proceeds of those activities were utilized to pay off JML's creditors in a fair, orderly, and timely fashion.

33. On August 8, 1981, Johnson executed a plan of complete liquidation under which all of the remaining assets of Johnson were distributed to Republic in accordance with the provisions of 26 U.S.C. § 334 and § 337; and Johnson Motor Lines, Inc. was dissolved. The principal reason for the liquidation was the reduction of Johnson's income tax liability under those statutory provisions. The formal Certificate of Completed Liquidation was issued by the Secretary of State of North Carolina on July 14, 1982.

THE MULTIEMPLOYER PENSION FUND WITHDRAWAL LIABILITY CLAIMS RECEIVED BY JOHNSON TO DATE

34. On January 29, 1981, we received an informal letter from the attorneys for Trucking Employees of North Jersey Fund (T.E.N.J.), advising that our withdrawal liability would be some $599,000.00. Because the fund apparently considered itself to fall within the scope of the "trucking industry" exemption" however, that letter, instead of demanding payment of withdrawal liability, reported, "Your Company is required to post a bond or deposit in escrow an amount equal to 50% of the withdrawal liability, in your case some $3,000 (sic)*." A copy of that letter is attached. (Attachment B) Later, however, T.E.N.J. apparently decided on a different interpretation of the statute, as well as a higher demand; concluded that it was not eligible to accord us the "trucking industry exemption" and, by letter dated July 6 and received by our counsel on July

*This presumably intended to read $300,000.

8, 1981, demanded immediate payment of $645,012, or $761,064.00 in sixteen quarterly increments of $46,734.00 each, including interest, and a final payment of $13,320.00 due September 1, 1984, with the first payment due retroactively on December 1, 1980.

35. Meanwhile, on June 23, 1981, we had received a claim from Central States, Southeast and Southwest Areas Pension Fund ("Central States"), demanding immediate payment of $16,658,936.94 in asserted withdrawal liability or, in the alternative, payment of $280,680.50 per month commencing July 1, 1981, including interest, which would amount to $3,368,166.00 per year, for approximately six and one-half years.

36. On August 21, 1981, we received a claim from the New England Teamsters and Trucking Industry Pension Fund ("New England Fund") for immediate payment of $1,402,961.00 in asserted withdrawal liability or, in the alternative, payment of $20,342.00 per month for a period of 93 months, plus a final payment of $13,071.00, for a total of $1,907,877.00 ($244,104.00 per year), including interest for the 93-month period.

37. By letter dated November 18, 1981, the Central Pennsylvania Teamsters Pension Fund made a demand for payment of $848,494.00 on or before January 17, 1982. A subsequent installment payment schedule demands, in the alternative, 110 monthly payments of $10,471.00, plus a final 111th payment of $1,757.54, for a total, including interest, of $1,151,810.00.

38. The Teamsters Joint Council No. 83 of Virginia originally suggested that it, and we, were subject to the so-called trucking industry exemption. On July 3, 1981, it demanded a bond for an amount slightly less than $95,000.00, 50% or the total withdrawal liability it had calculated. We pointed out, on July 23 and August 30, 1981, that even if the MPPAA were construed constitutionally to apply to Johnson, the provisions concerning closing of facilities prior to MPPAA's effective date, and another provision concerning *de minimis* amounts of liability made it unlikely that Johnson owed the Virginia Fund

anything, because it had closed its covered facility in Richmond in November 1979.

39. The Virginia Fund rejected this position by letter dated August 27, 1981 and reiterated its demand. To avoid further litigation expense, we tendered to the Virginia Fund the demanded security in the form of an irrevocable letter of credit on appropriate terms set out in counsel's letter dated September 10, 1981.

40. On February 24, 1982, we heard from the Virginia Fund that it was in the process of reexamining whether it constitutes a "trucking industry plan" within the meaning of MPPAA, and that it reserved to itself until September 1, 1982, to make that determination. When our counsel attempted to obtain information concerning the basis for the Funds' "reexamination," we were told that there was a good deal of uncertainty as to the legal question who is the "employer" in the context of MPPAA, and that the Fund had received conflicting interpretations on this question in informal discussions with the Pension Benefit Guaranty Corporation's staff.

41. Be that as it may, on July 9, 1982, the Virginia Fund announced that it had determined now that it is not a "trucking industry plan," returned Johnson's letter of credit, and demanded payment, by September 7, 1982, of a lump sum of $189,107.00, or $213,356.00 in 37 monthly installments of $5,651.00 plus a final payment of $4,269.00.

42. I understand that the correspondence between Republic and the Council No. 83 Fund, described in paragraphs 38 through 41 above, is being furnished to the Court by affidavit of Louis T. Urbanczyk, one of our attorneys in this matter.

IMPACT UPON REPUBLIC AND JOHNSON MOTOR LINES OF CLAIMS BY MULTIEMPLOYER PENSION FUNDS TO DATE

43. As Chairman of JML until its dissolution, and Chairman and Chief Executive Officer of Republic, it is part of my duties to be, and I am, familiar with the financial statements of

both companies. As of JML's August 1981 liquidation, JML had net assets of $7,497,402.00. Immediately after that liquidation, Republic's net assets were approximately $9,462,802.00. Republic's income from continuing operations before taxes in 1980 was $595,505.00.

44. The aggregate amount of the claims of New England, T.E.N.J., Central States, Central Pennsylvania, and the Virginia Fund exceeds $19,744,000.00. If paid on the installment schedules set by the funds, the amount claimed, with interest, actually would be $25,537,040.00. The principal amount claimed is nearly three times the total assets of Johnson at dissolution; the total amounts demanded on an installment basis, which include interest as determined by each of the funds separately, would aggregate more than three and one-half times Johnson's net worth. In fact, Johnson, in the 35 years of its existence, never earned that much money!

45. Looked at another way, the annual payments demanded by these five funds (approximately $4,000,000.00) approach seven times the pre-tax income from continuing operations of Republic in the year that JML ceased operations. The annual amount demanded by the Virginia Fund, about $67,000, exceeds 10% of that income.

46. JML contributed to five multi-employer funds in addition to New England, T.E.N.J., Central States, Central Pennsylvania, and the Virginia Fund. None of the five other funds has submitted a formal claim to JML for asserted withdrawal liability.

47. Because I have been advised by counsel that refusal to pay could have resulted, in the immediate future, in acceleration of each and every one of those claims, totalling in excess of $19,744,000.00, and to suit for the full amount of each claim plus interest, liquidated damages and attorneys' fees, we have filed suit in the District Courts having jurisdiction of these Funds. In our suit against Central States in the United States District Court for the Northern District of Illinois, (No. 81 C 3703), a temporary restraining order was entered by Judge Bua

against Central States' attempted enforcement of its claim. That case now awaits disposition on cross-motions for summary judgment. In the T.E.N.J. suit in District Court of New Jersey (No. 81-2344), a preliminary injunction was entered by agreement and the matter held in abeyance by Judge Meanor pending disposition of the Illinois case. In the New England suit in the District Court of Massachusetts, Judge Skinner entered a consent temporary restraining order after hearing argument of counsel, Republics motion for summary judgment is set for hearing on October 7, 1982. In the Central Pennsylvania suit in the United States District Court for the Eastern District of Pennsylvania, Judge Troutman denied Republic's Motion for Preliminary Relief on March 24, 1982, and has made it a condition of hearing our constitutional claims that we first go to arbitration; but stayed his order pending disposition of our appeal to the United States Court of Appeals for the Third Circuit.

48. It is obvious from the net worth figures given above that the cumulative effect of the five claims thus far asserted, unless barred, would be to take all of the assets of JML.

49. The impact on Republic would be equally destructive. Although 1981 was a reasonably good year, Republic operated at a loss in the first quarter of 1982, and we expect little, if any, improvement for the rest of the year.

50. Republic was in control of Johnson for approximately fourteen months. The decision to close down Johnson's operations was an agonizing one and itself caused Republic and its shareholders substantial loss. It was the only reasonable business decision that could have been made under the circumstances then known to us, was made only after careful explora-

tion of all alternatives, and without intent to evade any then-known responsibility.

/s/ Robert B. Riss

ROBERT B. RISS

Subscribed and sworn to before me this 20th day of September, 1982.

/s/ Rodger J. Walsh

RODGER J. WALSH
Notary Public

My commission expires ________

ATTACHMENT A

POST ON ALL BULLETIN BOARDS

To: All Employees:

It is with deep regret, based on economic conditions, your company will discontinue picking up freight on Friday, August 8, 1980. The company will discontinue all operations, i.e, general and special commodities, as soon as deliveries are accomplished.

You are assured by your company that based on current assets, funds will be made available upon completion of the shut down to pay all wages, including holidays, vacations, etc., where applicable.

As you are aware, many trucking companies are reporting severe financial deficits. Some are forced to partially close or completely shut down.

Our financial difficulties are attributed to various prevailing circumstances, including operating under the National Master Freight Agreement and its various supplementals, with predominant traffic being within the Southern Motor Carriers Rate Conference, a deep decline in the economy, high interest rates, and seriously imbalanced lanes of traffic.

We have operated the company with pride and dignity and we will close with pride and dignity. Our employees images must not be tarnished as a result of uncontrollable conditions because it was through your capabilities and efforts that enabled the company to operate for a number of years in the face of these uncontrollable conditions. These developments must not reflect on the positive contributions you made to your company.

Your Executive Staff and our parent company wish to thank you for your loyalty and dedication. We wish you health, happiness and success in your future endeavors. We are contacting

various companies in an effort to aid in the relocation of as many employees as possible.

H. E. Henderson
J. F. Gamble
W. E. Hampton
C. C. Helms
B. Mahon
W. B. McCall
L. A. Miller
J. C. Murdock
D. G. Pries
R. W. Rash
C. E. Sims

LTU AFF.
EXH. A

STEPTOE & JOHNSON
1250 Connecticut Avenue
Washington, D.C. 20036

James D. Hutchinson
(202) 862-2087

July 3, 1981

Johnson Motor Lines, Inc.
General Office
2426 North Graham Street.
P.O. Box 10877
Charlotte, North Carolina 28201

Gentlemen:

We serve as counsel to the Teamsters Joint Council No. 83 of Virginia Pension Fund (the "Fund"). Accordingly, we have been asked by the Fund Trustees to advise you that, in connection with your recent cessation of contributions to the Fund, the Fund actuary has made a determination of the withdrawal liability of Johnson Motor Lines, Inc. (the "Company") to the Fund under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980. The actuary has determined that the amount of unfunded vested benefits allocable to the Company is $189,107.

In accordance with the special rule for trucking industry plans set forth in ERISA § 4203(d), an employer who ceases contributions to a plan is required to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of ERISA § 412, or place into escrow with a bank or similar financial institution satisfactory to the plan, an amount equal to 50 percent of the employer's withdrawal liability. Unless the Pension Benefit Guaranty Corporation determines within 60 months that the withdrawing employer's cessation of contributions—together with any cessations by other

employers—has resulted in substantial damage to the plan's contribution base, the bond will be cancelled or the escrow refunded at the end of the five-year period. ERISA § 4203(d)(4) and (5).

Pursuant to ERISA §§ 4203 and 4219, we hereby demand that you furnish the Fund an acceptable bond or escrow for the amount of $94,553.50 within 60 days after the date of this letter. Kindly forward documentation of this bond or escrow to Mr. Joseph Gross, Administrator, Teamsters Joint Council No. 83 of Virginia Pension Fund, 1610 Forrest Avenue, Richmond, Virginia 23288.

Sincerely,

/s/ JAMES D. HUTCHINSON
James D. Hutchinson

JDH/bdm

cc: Mr. Joseph Gross
Administrator

LTU AFF.
EXH. B

July 23, 1981

BY HAND

Paul Ondrasik, Esquire
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Johnson Motor Lines—Teamsters Joint Counsel No. 83 of Virginia.

Dear Mr. Ondrasik:

Apropos our discussion of the claim against Johnson Motor Lines, I have the following information from Johnson which I would appreciate your transmitting to Mr. Gross:

Johnson closed its Richmond, Virginia, General Commodity facility, located at 6810 Hull Street on November 2, 1979. Prior to that date pension contributions were made to Joint Council No. 83 Pension Fund in behalf of 25 employees. After the Hull Street facility closed, five employees continued to work for Johnson's Special Commodity Division (these employees had previously worked in the General Commodity Division) located at 4933 Old Midlothian Pike. That facility was closed in August 1980.

As you know, it is Johnson's position that the MPPAA provisions may not constitutionally be applied to Johnson's pre-enactment termination of its business. However, even if the statute were construed to apply, it seems apparent that § 4217 of ERISA as amended by MPPAA would require, at least, a significant reduction in amount of withdrawal liability suggested by Mr. Hutchinson's letter of July 3, and probably the total elimination of such liability under § 4209.

I have enclosed for your information a list of the persons employed at Johnson's Richmond Hull Street facility that was closed on November 2, 1979. The five persons on that list

identified by asterisks were transferred to the Old Midlothian Pike facility thereafter and continued to work for Johnson until August 1980.

Sincerely yours,

Lester M. Bridgeman

LTU AFF.
EXH. C

August 20, 1981

Paul J. Ondrasik, Esquire
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Johnson Motor Lines—Teamsters Joint Counsel No. 83 of Virginia.

Dear Mr. Ondrasik:

In reference to your telephone conversation of August 11, 1981, with Lester Bridgeman, I submit the following additional information respecting the November 2, 1979, closing of Johnson's General Commodities facility in Richmond, Virginia:

Johnson's General Commodities facility at 6810 Hull Street in Richmond handled General Commodities Division freight. Its function was local pickup and delivery of freight, and loading and unloading of over-the-road trailers.

Johnson's General Commodities Division essentially encompassed its regular route operations transporting primarily less-than-truckload freight.

Johnson's Special Commodities facility at 4923 Old Midlothian Pike in Richmond was exclusively a terminal for truckload, irregular route operations. Johnson's Special Commodities Division encompassed its irregular route, basically truckload business, and over-the-road operations in that business were handled by owner-operators.

Until November 1, 1979, Johnson's employees at the General Commodities facility were the only Johnson employees within the jurisdiction of Joint Council No. 83 who were covered by the Council's pension plan. As of November 1, 1979, Johnson had 25 employees at the General Commodities facility. No Special Commodities facility employee, of which there were two management supervisors, was covered by that plan.

The General Commodities facility was closed on November 2, 1979, and all 25 Union employees at that facility laid off. The Union then insisted that local cartage work at the Special Commodities facility be handled by Union labor. Johnson then agreed to, and did, rehire the five most senior former General Commodities facility employees on an "as needed" basis, to handle local pick-up and delivery at the Special Commodities facility.

The later re-hiring of Union employees for work at a different, pre-existing facility, does not detract from the fact that there was a closure of a facility within the meaning of § 4217. The Congress defined 'Facility' as an "economic unit, generally at a single physical location, where business is conducted or industrial operations are performed." House Ways and Means Committee Report on the MPPAA. H.R. Rept. 96-869 Part II (April 23, 1980).

Neither contributions nor base units attributable to the General Commodities facility may be taken into account in determining the amount of unfunded vested benefits allocable to Johnson pursuant to § 4211. This is clear from the legislative history of the MPPAA. See the colloquy between Senators Bradley and Williams, and the statement of Senator Doyle at 126 Cong. Rec. S. 11669 (daily ed. August 26, 1980); and the colloquy between Mr. Rostenkowski and Mr. Thompson in the House of Representatives, see 126 Cong. Rec. H. 9179 (daily ed. Sept. 19, 1980).

Even if the MPPAA were deemed to apply, Johnson's position, therefore, is that no unfunded vested benefits are allocable to it for work performed at any time at the General Commodities facility, since that facility was closed completely prior to April 19, 1980.

Because the five senior employees were rehired for work at the Special Commodities facility with their past service benefits intact, there may be some small unfunded vested liability allocable to Johnson for contributions made in behalf of these employees from November 9, 1979 to August 8, 1980. That

work was primarily in the Plan Year 1980, however, and the 1979 portion clearly falls within the *de minimis* exception of § 4209 of the MPPAA.

Johnson cannot reasonably determine whether, or how, it will take action under ERISA §§ 4203(d)(3)(i) or (ii) until the Council responds to this letter and that of July 23, 1981. Unless we have that response by Monday, August 31, 1981, we shall be compelled to file suit for an injunction.

Sincerely yours,

Louis T. Urbanczyk

P.S. The materials forwarded to us by you did not include the Form 5500 for 1979. Will you please supply that material as soon as possible?

LTU AFF.
EXH. D

STEPTOE & JOHNSON
1250 Connecticut Avenue
Washington, D.C. 20036

(202) 862-2000
TELEX 89-2503
Writer's Direct Dial Number

August 27, 1981

Lester Bridgeman, Esq.
210 United Unions Building
1750 New York Avenue, N.W.
Washington, DC 20006

Re: Johnson Motor Lines—Teamsters Joint Counsel No. 83 of Virginia Withdrawal Liability Claim

Dear Mr. Bridgeman:

We are responding on behalf of the Trustees of the Teamsters Joint Council No. 83 of Virginia Pension Fund ("Fund") to your letters of July 23, 1981 and August 20, 1981 in which Johnson Motor Lines, Inc. ("Johnson") asserted that it has no withdrawal liability to the Fund because a permanent closure of its "facility" located at 6810 Hull Street, Richmond, Virginia occurred on or before April 29, 1980. Based on an examination of the facts within the context of the controlling law, the Fund must reject your suggestion that the closure of the Hull Street terminal extinguished such liability for the following reasons.

First, it is the Fund's position that the two terminals maintained by Johnson in Richmond at Hull Street and 4923 Old Midlothian Pike did not constitute separate "facilities" within the meaning of § 4217(a)(2) of the Multi-Employer Pension Plan Amendment Act of 1980 ("Act"). Consequently, since Johnson admittedly continued operations at its Old Midlothian Pike terminal after the closure of the Hull Street terminal, no closure of a "facility" within the meaning of § 4217(a)(2) took

place. Second, even if the Hull Street terminal constituted a separate "facility", it is the opinion of the Fund that § 4217(a)(2) is inapplicable because "all covered operations" at that facility were not "permanently ceased". Rather, as indicated in your letters, following the closure of the Hull Street terminal, work formerly performed at Hull Street was transferred and continued at Johnson's Old Midlothian Pike terminal. Moreover, that work was performed by a number of the same employees formerly employed at the Hull Street terminal.

Accordingly, the Fund must adhere to its position stated in our July 3, 1981 letter. We, therefore, demand once again that the company furnish the Fund with an acceptable bond or escrow in the amount of $94,553.50. If Johnson fails to provide the Fund with an acceptable bond or escrow in that amount on or before September 1, 1981, the Fund will have no choice but to resort to the various remedies provided it under the Act. Please be advised that this letter constitutes notice to you of the Fund's rejection of Johnson's claim pursuant to § 4219(b)(2)(B) of the Act and begins the sixty (60) day limitations period set forth in § 4221(a) of the statute.

Sincerely,

/s/ JAMES D. HUTCHINSON
James D. Hutchinson

cc: Joseph Gross

LTU AFF.
EXH. E

STEPTOE & JOHNSON
CHARTERED
1250 Connecticut Avenue
Washington, D.C. 20036

(202) 862-2000
TELEX 89-2503
Writer's Direct Dial Number
826-2111

February 24, 1982

Louis T. Urbanczyk, Esquire
210 United Unions Building
1750 New York Avenue, N.W.
Washington, DC 20006

Re: Johnson Motor Lines, Inc.—Teamsters Joint Counsel No. 83 of Virginia Pension Fund

Dear Mr. Urbanczyk:

This letter will follow up our recent telephone conversation. As I indicated to you at that time, the Trustees of the Teamsters Joint Council No. 83 of Virginia Pension Fund ("Pension Fund") have not, as yet, made a determination as to whether to accept the letter of credit tendered to it by Johnson Motor Lines, Inc. ("Johnson"). The Trustees are still awaiting the information we requested concerning the circumstances under which the letter of credit was obtained so that they can evaluate fully the Multiemployer Pension Plan Amendments Act ("MPPAA") and bankruptcy consequences of accepting a letter of credit in lieu of a bond or escrow. Until the requested information is received, no final decision will be made by the Trustees.

As I also indicated to you, the Fund is in the process of re-examining whether it constitutes a "trucking industry plan" within the meaning of Section 4203(d) of the MPPAA. Obvious-

ly, if the Fund is not a trucking industry plan, Johnson's present withdrawal liability obligations to the Fund could not be satisfied by posting a bond or escrow as permitted by MPPAA § 4203(d). Rather, its withdrawal liability to the Fund would be due and payable immediately.

Despite its re-examination of its status as a trucking industry plan, the Fund still believes that the best interests of both parties would be served by avoiding litigation over this matter. As you are well aware, there is considerable litigation currently ongoing in the federal courts as to the scope of the trucking industry exception to the withdrawal liability provisions of the MPPAA as well as to the constitutionality of the withdrawal liability provisions of the statute themselves. Consequently, we would propose the following modifications to your earlier proposal as an interim solution while we both await further developments in the federal courts:

(A) Provided that the Trustees decide that the letter of credit is acceptable under the MPPAA and creates no bankruptcy problems, the Fund would accept the letter of credit in lieu of a bond or escrow.

(B) The terms under which the Fund accepts the letter of credit would be those set forth in your letter of September 10, 1981 with the following modifications:

(1) A new subparagraph (c) would be added to paragraph (2) stating: "The Fund determines by September 1, 1982 that it is not a trucking industry plan within the meaning of the MPPAA and returns the letter of credit to Johnson."

(2) Paragraph 4 of your September 10, 1981 letter would be modified by adding the following language: "so long as the Fund retains the letter of credit," immediately after the term "withdrawn from the Fund's plan" which appears at the end of the first clause of paragraph 4.

(3) A new paragraph 5 would be added to your September 10, 1981 letter stating the following:

"5. Johnson expressly acknowledges and agrees that, in accepting the letter of credit under this

agreement, the Fund explicitly reserves the rights:

(a)to determine by September 1, 1982 that it is not a trucking industry plan within the meaning of the MPPAA and that, as a result, MPPAA § 4203 has no application to Johnson's situation;

(b)to return the letter of credit tendered hereunder to Johnson; and

(c)to proceed against Johnson under the terms of the MPPAA to collect the full amount of Johnson's withdrawal liability to the Fund ($189,007.00).

In the event that the Fund decides to exercise such rights, it shall provide Johnson with written notice of such decision accompanied by a withdrawal liability payment schedule, and such notice, together with the prior notices and materials submitted to Johnson concerning the amount of Johnson's withdrawal liability to the Fund and the basis for such amount, shall be deemed to constitute satisfactory and timely notice for purposes of MPPAA § 4219(b)(1)."

(4) A new paragraph 6 would be added to your September 10, 1981 letter stating as follows:

"6. Johnson further acknowledges and agrees:

(a)that the Fund has not waived any rights and remedies available to it under the MPPAA by entering into this agreement; and

(b)that the Fund's acceptance of the letter of credit pursuant to the terms of this agreement shall not be used in evidence against it in any proceeding to enforce and/or collect Johnson's withdrawal liability to the Fund."*

As is evident from the foregoing, the Fund merely seeks to reserve the same rights that Johnson desires to reserve while we await developments in this area in the federal courts. I look forward to your comments on this proposal, as well as to

receiving the materials necessary for the Trustees to make a final determination as to whether to accept the letter of credit.

Sincerely,

/s/ PAUL J. ONDRASIK, JR.
Paul J. Ondrasik, Jr.

cc: Joseph Gross

* I have attached a redraft of your September 10, 1981 letter which includes the modifications we propose underlined.

LTU AFF.
EXH. F

STEPTOE & JOHNSON
CHARTERED
1250 Connecticut Avenue
Washington, D.C. 20036

Paul J. Ondrasik, Jr.
(202) 862-2111

April 2, 1982

Louis T. Urbanczyk, Esq.
210 United Nations Building
750 New York Avenue, N.W.
Washington, D.C. 20006

Re: Johnson Motor Lines, Inc.—Teamsters Joint Counsel No. 83 of Virginia Pension Fund

Dear Mr. Urbanczyk:

This is in response to your letter of March 4, 1982, in which you requested additional information concerning the Teamsters Joint Council No. 83 of Virginia Pension Fund's ("Fund") reexamination of its status as a "trucking industry plan" within the meaning of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). At the present time, we are not willing to provide you with the detailed factual information you requested since it is not pertinent to the primary basis for the Fund's reexamination of its status and, in our view, is unnecessary to evaluate our proposal of February 24, 1982. We are, however, willing to provide you with the following information in an effort to secure agreement on our February 24 proposal.

Specifically, the Fund's reexamination of its status as a trucking industry plan primarily turns on the proper definition of the term "employer" as used in MPPAA Section 4203(d), the trucking industry exception to the MPPAA's employer withdrawal liability provisions. As you are aware, Section 4203(d) defines a "trucking industry plan" as one in which "substantial-

ly all of the contributions required under the plan are made by *employers primarily engaged* in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry." (emphasis added) Unfortunately, neither the MPPAA nor Section 4203(d) provides a definition of "employer" for purposes of that provision.

In reaching its preliminary conclusion that the Fund constituted a trucking industry plan, the Fund defined the term "employer" in Section 4203 narrowly and looked only to the actual employers who were obligated to contribute to it under the pertinent collective bargaining agreements. It did not apply the definition of an employer found in Section 4001(c)(1) of the Employee Retirement Income Security Act ("ERISA") which states that "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer." See also, 29 C.F.R. § 2612. If this "control group" definition of "employer" applies to MPPAA Section 4203(d), an employer for purposes of that provision would constitute not only the immediate employer having an obligation to contribute to a plan, but also all business affiliates of that immediate employer that are under common control. Thus, the activities of each employer contributing to a plan as well as the commonly controlled affiliates of that employer would have to be taken into account in determining whether a plan constitutes a trucking industry plan, *i.e.*, whether the plan receives "substantially all" of its contributions from "employers primarily engaged" in activities described in Section 4203(d) of the MPPAA.

The Fund currently is examining the legal question whether this "control group" definition of employer applies to MPPAA Section 4203(d). If it does, there is little doubt that the Fund does not constitute a "trucking industry plan" since many of the Fund's contributing employers are part of control groups that are not "primarily engaged" in activities described in Section 4203(d) when their total operations are taken into account. There is, of course, a good deal of uncertainty

surrounding this issue despite the fact that ERISA Section 4001(c)(1) purports to apply to all of Title IV of ERISA, the Title in which the MPPAA was included ultimately. The MPPAA, as noted earlier, does not address this issue directly. Nor has the Pension Benefit Guaranty Corporation ("PBGC") issued any regulations in the MPPAA in general, or on Section 4203(d) in particular, which offer guidance on this issue. Indeed, the Fund has received conflicting interpretations on this question in informal discussions with PBGC's staff. It also is our understanding that this issue is involved, at least tangentially, in a number of the cases now pending in the federal courts which challenge the constitutionality of the MPPAA's employer withdrawal liability provisions. In addition to this legal analysis, the Fund is reexamining the factual basis for its initial conclusion regarding trucking industry plan status since, even apart from the control group issue, it appears that it may have treated a number of contributing employers erroneously as "trucking industry" employers when the non-Fund covered operations of such employers are taken into account.

The Fund proposed a deferral of the trucking industry question until September 1, 1982, not only to permit it to complete this legal and factual analysis, but also, to avoid any unnecessary litigation over this matter between the parties. Hopefully, by that time, we will have some guidance on the proper interpretation of the trucking industry exception from the courts or PBGC. Moreover, we may have some guidance on the constitutionality of the employer withdrawal liability provisions of the MPPAA themselves. At the same time, the proposed September 1, 1982 deadline insures that this matter will be resolved finally in the near future. The only alternative is litigation over Johnson's withdrawal liability to the Fund at the present time, since the Fund would have little choice but to take the position that it is not a trucking industry plan based on the information currently available to it and to institute collection proceedings. This alternative hardly seems in the best interests of either of our clients when the possibility of avoiding all litigation on these questions is available.

I trust that the foregoing will permit you to advise your client concerning our February 24, 1982 proposal. In the interim, I would urge you to have them provide us as soon as possible with the information we requested concerning the circumstances under which the letter of credit was obtained so that the Fund can make a decision whether to accept the letter of credit in lieu of a bond or escrow. As we indicated to you at the time the letter of credit was tendered to the Fund and in our letter of February 24, 1982, no final decision to accept the letter of credit will be made until the Fund receives such information. The Fund's prompt receipt of that material will assist in bringing this matter to an expeditious conclusion.

I look forward to hearing from you on our proposal. If you have any questions, please feel free to call on me at your convenience.

Sincerely

/s/ PAUL J. ONDRASIK, JR.
Paul J. Ondrasik, Jr.

cc: Joseph Gross

LTU AFF.
EXH. G

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CHARTERED
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Paul J. Ondrasik, Jr.
(202) 862-2111

July 9, 1982

Louis T. Urbanczyk, Esq.
304 Capital Gallery East
600 Maryland Avenue, S.W.
Washington, D.C. 20024

Re: Teamsters Joint Council No. 83 of Virginia Pension Fund—Johnson Motor Lines

Dear Mr. Urbanczyk:

This is to advise you that the Trustees of the Teamsters Joint Council No. 83 of Virginia Pension Fund ("Pension Fund") have completed their review of whether the Pension Fund constitutes a "trucking industry plan" within the meaning of Section 4203(d) of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") and have concluded that the Pension Fund is not a "trucking industry plan." Consequently, the trucking industry exception to the employer withdrawal liability provisions of the MPPAA is not available to Johnson Motor Lines, Inc. ("Johnson") in connection with its withdrawal from the Pension Fund in August, 1980. I therefore am returning to you the letter of credit which was tendered unilaterally by your client to the Fund in an attempt to comply with the terms of the trucking industry exception. As you know, this letter of credit was never accepted by the Fund. By separate letter, a copy of which is enclosed, the Pension Fund has made demand upon Republic Industries, Inc., Johnson's successor-in-interest, to satisfy the employer withdrawal liability generated by Johnson's withdrawal from the Fund.

If you have any questions concerning the matters discussed herein, please feel free to call me at your convenience. I trust that there will be some way that we can resolve this situation short of litigation.

Sincerely,

/s/ PAUL J. ONDRASIK, JR.
Paul J. Ondrasik, Jr.

Encl.
cc: Joseph Gross

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

C.A. No. 82-0919-A

REPUBLIC INDUSTRIES, INC.,

Plaintiff,

v.

TEAMSTERS JOINT COUNCIL NO. 83
OF VIRGINIA PENSION FUND,

Defendant.

AFFIDAVIT OF JOSEPH A. LoCICERO

State of New York)
County of New York) ss;

Joseph A. LoCicero, having first been duly sworn, deposes and states as follows:

1. I am an actuary and benefit consultant employed by Buck Consultants, Inc. ("Buck"), and am stationed in its New York City office as Director of Buck's Multiemployer Pension Plan Consulting Services. My pension consulting experience began at Buck in 1970 after my graduation from Hunter College with a B.A. in mathematics. I have since continuously been employed by Buck.

2. Founded in 1916, Buck is one of the nation's oldest and largest actuarial and employee benefits consulting firms, serving more than 2,000 single-and multi-employer pension, and other, benefit plans in all 50 states. These plans cover some seven million active and retired employees and total approximately $100 billion in assets. Buck's services cover the entire employee benefits field, including design, implementation, administration, and communication of benefits programs. Buck is headquartered in New York and has offices in Atlanta, Chica-

go, Dallas, Pittsburgh, San Francisco, Washington, D.C., and Toronto.

3. My primary responsibilities as Director of Multiemployer Consulting Services are to provide actuarial advice and consulting services to employers who contribute to multiemployer pension plans. In addition, I serve as consultant and enrolled actuary to a major national multiemployer pension plan. On other occasions, I have been retained by multiemployer plan boards of trustees to review and audit the work of their regular enrolled actuary.

4. I am required to work closely, and am familiar, with the regulations and laws governing pension plans, including but not limited to, the Employee Retirement Income Security Act of 1974 (ERISA) as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).

5. I am an Enrolled Actuary (Number 928), a Member of the American Academy of Actuaries, and a Member of the American Society of Pension Actuaries.

6. Since 1977 I have served on the American Academy of Actuaries' Task Force on Multiemployer Pension Plans. The Task Force's primary function during 1978, 1979 and 1980 was to provide advice and suggestions to the Pension Benefit Guaranty Corporation (PBGC) with regard to its development of the legislation that ultimately became MPPAA. The Task Force continues to monitor related issues, including the development of regulations governing MPPAA.

7. In addition to conducting a series of Buck-sponsored one-day seminars on MPPAA, I have lectured on MPPAA before audiences of the Practicing Law Institute, the International Foundation of Employee Benefits, the Chamber of Commerce, the American Society of Personnel Administrators, the American Management Association and the Annual Conference of Enrolled Actuaries and the Society of Actuaries. I have written articles on MPPAA for non-actuaries which were published in the *Personnel Administrator*, the *Personnel Journal*

and the magazine *Cash Flow*. I have appeared as an expert witness, and submitted statements, in proceedings involving MPPAA.

7A. I have not had the opportunity to examine the actuarial valuations of the Teamsters Joint Council No. 83 of Virginia Pension Fund in detail, but am familiar with the work of the Martin E. Segal Company, that Fund's actuary, in other multiemployer pension funds.

Multiemployer Pension Plans In General

8. Multiemployer pension plans came into existence primarily for the purpose of providing retirement income security for union workers whose employment might be for only short periods of time with the same employer. For example, in the construction industry an employee might work in the same craft for his entire working lifetime, but work for a number of different employers over that period of time. In that and other industries, such as the motor carrier industry, business closings and layoffs usually will not affect pension coverage, or significantly affect the amount of contributions made on behalf of the affected employees, if they find similar employment. Multiemployer pension plans are designed so that the employee will have some measure of pension protection against lay-off or employer termination, because a "pool" of employers is available, and the employee would not lose accrued service toward his pension when he moves from one employer to another while he or she remains in the same type of employment and is covered by the same plan or a similar plan with a reciprocal agreement.

9. Generally, employers or an employer association will negotiate with the union a level of contribution which may be in the form of cents per hour, dollars per man-day, dollars per ton, or some other unit of production. The collective bargaining agreement generally provides for a defined level of contributions only; not for benefits. It is the plan's Board of Trustees that decides what the benefit level will be. As I will show

below, this split in responsibility for contributions and responsibility for benefit-setting is a significant one.

New Rules Under MPPAA

10. Under the MPPAA, an employer who withdraws from a multiemployer plan is required to make payments to the plan for a portion of the plan's unfunded vested benefit liability, if any. "Unfunded vested benefit liability" ("UVBL") refers to that amount by which the estimated present value of all of the vested, or nonforfeitable, interests of participants in the fund exceeds the fund's present asset value. The proportion of that liability allocated to a withdrawing employer as withdrawal liability is determined on the basis of the allocation rule adopted by the Board of Trustees for this purpose. MPPAA provides a presumptive allocation rule which applies to all multiemployer plans unless the plan adopts an alternative rule. MPPAA provides for three such alternatives and allows for further variations.

11. The presumptive rule and two of the alternatives would all generate the same result as applied to employers withdrawing in the first year of the statute's application. Since Johnson Motor Lines ("Johnson") terminated its contributions in the first year of the statute's application, the amount of its withdrawal liability would not vary no matter which of these three allocation rules was selected. Under the presumptive rule and two of the alternative rules, the employer's fractional "share" of the plan's unfunded vested liability is equal to the employer's contributions during the previous 5 plan years divided by the contributions made over the same period by all employers remaining in the fund at the time of withdrawal. All three of these rules require the withdrawing employer to pay a portion of the unfunded vested benefit liability attributable to *all* present and former employees of *all* present employers in the fund, even though the withdrawing employer never had any contractual relationship with the vast majority of the employees participating in the fund as a whole. Employers who withdrew before April 29, 1980 are subject to no withdrawal

liability whatever. Thus, under these rules, the unfunded vested benefit liability attributable to the employees of those employers is involuntarily shared among, and "inherited" by, employers who withdraw after April 28, 1980. These "inherited" liabilities, *inter alia*, cause an employer's withdrawal liability to be disproportionate to its involvement as a contributor to the fund.

12. The fourth rule, the "Direct Attribution Method," allocates liabilities based on the actual employees of an employer. Because of the portability features of multiemployer plans discussed above and the complexities of administration, only a limited number of plans have been able to utilize this rule. Neither the Teamsters Fund nor any of the five other funds that has asserted a claim for withdrawal liability against Johnson relies upon the direct attribution method.

MPPAA Withdrawal Liability Provisions And Actuarial Assumptions.

13. In my opinion, the MPPAA's withdrawal liability provisions are anomalous and, in a sense, redundant in that one of the purposes for having a multiemployer fund is to create a "pool" of employers which will protect the fund's contribution base, as individual employers disappear from the pool. The controlling consideration is not the contributions of any particular employer, but the continuous flow of a volume of contributions, adequate to fund the plan, from those employers who happen to be extant and obligated to contribute to the plan at any particular time. For example, the history of the Teamsters Fund over the five years concluding with 1980 shows an overall increase in contributions, in benefits payable, and in net assets. There is no doubt that, during that period, an indeterminate number of employers "withdrew"; but the "pool" maintained itself. Although there may have been some reduction in active participants during 1980 there was an increase in contribution amounts and in net assets from the previous year. I believe that if measured against the criteria routinely used in the actuarial profession, the Teamsters Fund is being ade-

quately funded and that there is no significant likelihood of its termination in the foreseeable future.

14. It is doubtful whether any form of MPPAA would have been necessary but for the enactment of ERISA. ERISA imposed a variety of burdensome new requirements on multiemployer funds such that PBGC, in its 1978 Report to Congress, explicitly recognized that, to the extent that some multiemployer plans might be endangered, the fault was largely attributable to the enactment of ERISA in 1974. ERISA required, for example, that benefits vest within a shorter period of time than the vesting period theretofore provided for by many multiemployer funds. Most plans, in order to comply with ERISA, selected 10 years of service as the new vesting period. When the new vesting rules became effective the unfunded vested benefit liabilities of many plans increased drastically, in many cases more than doubling or trebling their previous levels. This occurred because benefits owed to employees not yet eligible for retirement, but who had met the new vesting requirement (*e.g.*, 10 years of service), had to be included in the calculation.

An example of the magnitude of increase which the vesting provisions of ERISA can have upon unfunded vested benefit liability is the Local 705 Teamsters Pension Fund of Chicago. I have reviewed the affidavit of its actuary in which he states that the Fund suffered a *four-fold* increase in UVBL principally due to plan amendments in compliance with ERISA. Affidavit of A. S. Hanse, Inc., *Peick* v. *PGBC*, No. 81 C 1911 (N.D.Ill., filed April 6, 1981). This is not a unique situation. In my capacity as an actuarial consultant, I have reviewed interrogatory answers of the Central States, Southeast and Southwest Areas Pension Fund in which it has admitted that the vesting provisions of ERISA have exacerbated UVBL. Answer to Interrogatory 12, *Johnson Motor Lines* v. *Central States, Southeast and Southwest Areas Pension Fund*, No. 81 C 3703 (N.D.Ill. filed July 1, 1981). My personal experience as a consultant to multiemployer plans also confirms the premise that the vesting provisions of ERISA generally caused an increase in the level of UVBL for multiemployer plans.

15. Limitations were also imposed by ERISA upon the ability of trustees, in times of economic difficulty, to reduce plan benefits. The costs of compliance with ERISA and its regulations also have sharply increased the costs of administering multiemployer pension plans.

16. In my opinion there is substantial doubt that unfunded vested benefit liability, in and of itself, provides an accurate basis either for measuring fund stability, or for assessing liability against employers who terminate their contributions to a multiemployer plan, whether because of inability to continue their contributions or otherwise. My opinion is premised on the following:

16.1. Although it is obviously better for a pension plan to be fully funded, it is normal for a pension plan to have an unfunded vested benefit liability. The mere existence of such a liability does not mean that the plan is in any danger of insolvency. Thus, to the extent that the purpose of the withdrawal liability provisions of the MPPAA is to insulate the PBGC from liability as the insurer of the vested benefits of multiemployer plans, there is no genuine need for such provisions to insure the actuarial soundness of most multiemployer plans. The PBGC's liability is *insolvency*-based, and the unfunded vested benefits liability of a pension plan is simply not, in and of itself, a valid measure of the risk of plan insolvency. The actual consideration is not the amount of a plan's UVBL but the amount of UVBL relative to the size of the plan and the stability of its contribution base. In the case of the Teamsters Fund, for example, although its UVBL as estimated by its actuary, is large in absolute terms, it also is quite manageable relative to the size of its contribution base.

Prior to the MPPAA, actuarial valuations of a plan were not made for the purpose of ascertaining the specific dollar amount of unfunded liabilities "owed" to plan participants at any given moment in time. Rather estimates of unfunded benefit liabilities were calculated as a funding tool. To use actuarial computations of UVBL as a means of allocating a specific dollar amount of liability to employers who leave a plan at a given

point in time is to use an actuarial tool for a purpose for which it was never designed and for which it is ill-suited. Many factors account for, and contribute to, the excess of estimated total vested benefit liabilities over total assets in multiemployer funds. They include, but are not limited to, the following:

16.11. ERISA's imposition of more stringent vesting requirements than previously contained in multiemployer fund plans (see ¶ 14 above).

16.12. The bifurcation of function between contribution-setting and benefit-setting. Most multiemployer pension plans provide a "fixed" dollar benefit for each year of service, but the benefits are defined by the trustees and not by the collective bargaining process, which defines only contribution levels. As a consequence, employers historically have been unconcerned with benefit levels because their contractual duties were limited to making contributions. Moreover, in determining benefit levels, trustees historically have been unconcerned about creating unfunded benefit liabilities because actuaries have advised them, in most instances, that benefit increases could be funded on an actuarially sound basis notwithstanding the existence of the unfunded liabilities created as a consequence. Thus, as union and management negotiate increases in contributions, trustees have commonly used such increases to fund additional benefits to keep pace with inflation rather than to decrease unfunded liabilities. Higher benefit levels do not only create "future" liabilities. They result in additional past service liabilities if the benefits are improved for all years of prior service, as they typically are in multiemployer plans. If benefit improvements are made by the trustees every three years in tandem with the negotiating cycle, new unfunded past service liabilities will periodically be added on top of the old liabilities. Before enactment of MPPAA there was no reason for employers in funds, such as the Teamsters Fund, to be concerned about increases in unfunded vested benefit liabilities, whether they resulted from benefit increases or other factors. Now, however, the law not only requires that fund liabilities be amortized, but also, it creates an employer liability measured by the fund's calculation of its unfunded vested liabilities.

16.13. Union organizing efforts frequently result in the grant of credits for past service, for pension purposes, unfunded by prior employer contributions. As new entrants come into a plan with "non-contributory" past service credit, the fund's vested benefit liability increases. By "non-contributory" past service credit, I mean pension credit given a fund participant for years of employment prior to his participation in the fund; that is, service for which no employer contributions were made. Each time benefit levels are increased the effect on the fund's vested benefit liability of the grant of non-contributory past service credits is exacerbated.

16.14. Fluctuations in the calculated value of the fund's assets and the rate of return on its investments, resulting from factors totally outside the control of employers or trustees, may also affect vested benefit liability. For example, inflation, recession, stock market and interest rate fluctuations, real estate value fluctuations, etc., all have a substantial effect on unfunded vested benefit liability.

Moreover, as indicated above, the unfunded vested benefit liability of a fund is the amount by which the estimated value of fund assets exceed the value of fund assets. But the asset value figure also entails a significant degree of subjective judgment, normally—at least ultimately—by fund accountants who may rely upon any one, or more than one, of various measures of value such as estimated fair market value, adjusted cost, etc.

None of the factors described above is within the control of employers or is a matter for which they are or could be responsible.

16.2. UVBL is the resultant of an agglomerate of actuarial assumptions which were never designed for the definitive determination of a specific dollar amount of liability. I should like to explain that statement:

16.21. The actuarial valuation of a plan depends upon numerous actuarial assumptions to develop an estimate of the present value of expected future benefits and expense payments, anticipated future contributions, etc. The bases for such an estimate are necessarily assumptions because, as the actuary for two of the

largest multiemployer funds has pointed out, "Actuaries . . . do not know the future number of deaths, disability retirements, age retirements, or the future life expectancy of an industry, trade or craft. They certainly do not know future investment experience." (*Joint Trust Pension Plans*, Daniel F. McGinn, Pension Research Council, Wharton School, University of Pennsylvania (Philadelphia, 1978) at p. 16). In fact, it can be concluded that it is the rule, rather than the exception, that actuarial assumptions will turn out to be wrong. I have heard Dale Grant, a Vice President of the Teamster Fund's actuary, readily agree with that conclusion.

Actuaries, nevertheless, are quite comfortable making assumptions with respect to future experience within the context of their traditional role of preparing periodic valuations of pension plans. This is because in that role as prognosticators of the economic future of a given plan, to the extent that the plan's later experience does not conform to their assumptions, the plan will merely incur actuarial gains or losses. For example, if earnings in a given year are greater than the assumed future rate of return used for valuation purposes, a gain will be experienced as a result of that assumption. Adjustments in assumptions will be made in the future to take into account any gains and losses. Thus an actuarial determination is not intended to be a precise calculation but merely the actuary's best estimate after "taking into account the experience of the plan and reasonable expectations" which includes his estimate of future economic conditions.

From the standpoint of funding, the practice of assuming a future rate of return on investment below that actually received represents sound and conservative actuarial practice. Pessimistic assumptions tend to insure adequate future funding. The impact of these conservative estimates on unfunded vested benefit liability, however (discussed below), is to inflate that figure.

Funds such as the Teamsters Fund also make assumptions about retirement age, disability experience, mortality, turnover etc.; and when the actuary determines that later experience is inconsistent with

prior assumptions, he is prepared to change those assumptions.

16.22. Actuaries have, necessarily, relied upon assumptions about the future in making valuations about the future in making valuations or forecasts with respect to pension plans. Assumptions may also have to be made about employee census data because actuaries generally are not given complete factual information about any given fund, its participant population or its total characteristics. In addition, of course, they have no way of *knowing* what will, in fact, happen in the future. Fund managers and trustees are given to understand that actuaries are, in effect, providing informed estimates about such matters as a fund's future income, future liabilities, future rates of return, etc. I have heard Mr. McGinn, whom I have cited above, refer to actuarial assumptions as "guesstimates." Historically, actuaries have periodically reassessed their assumptions and conclusions about the future experience of particular plans in light of intervening developments. The intervening factual information might establish that particular actuarial assumptions were, in retrospect, incorrect or unreasonable. Many actuaries accept that each individual actuarial assumption need not, in and of itself, be reasonable, so long as the actuarial assumptions used in a given situation are not "unreasonable in the aggregate." This is based on the theory that, although assumptions about individual matters might turn out to be erroneous or unreasonable, such errors would, or could, cancel each other out and that egregious error would, in any event, be detected in the course of periodic review and would be corrected.

16.23. In making fund valuations and estimating the future experience of funds for planning purposes, actuarial assumptions "always," or generally, turn out to be wrong. They are corrected, or cured, by periodic actuarial review and adjustment. Also, no such assumption results in imposition of money liability on anyone. However, no such safeguard as periodic review exists when actuarial assumptions are relied on to estimate an unfunded vested benefit liability figure as required by MPPAA. There the actuarial assumptions result in a *final, definitive* determination of a specific amount of liability. Although here, too, the same kinds of assump-

tions about future rates of return on investment, credit for past service, etc., must be made by the actuary, the opportunity for later self-correction is eliminated. Hence, MPPAA authorizes the use of unreasonable assumptions in calculating UVBL so long as they are not unreasonable in the aggregate, but provides no possibility of later adjustment. In the absence of the vital self-correcting revaluation procedure, the "reasonableness" criterion becomes, in my opinion, an irrational one.

In calculating UVBL for use in withdrawal liability calculations, the actuary is making a determination which will be fixed in time and will not participate in the future gains and losses of the plan. Since the actuary must utilize his best future expectations in that determination, by definition, the accuracy of the number depends on the actuary's ability to predict the future accurately.

16.24. Under MPPAA, the actuary of a multiemployer pension plan ultimately determines the withdrawal liability for an individual employer by his calculation of UVBL which is

— the difference between the value of nonforfeitable benefits and

— the value of the assets of the plan.

In accordance with MPPAA, the actuary, in making this determination, must use "actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan. . . ."

Two of the crucial assumptions used in the determination of withdrawal liability—once given the estimate of asset value—are the rates of mortality, which are used to determine the length of time that benefits will be paid out, and the future interest rate the be earned on fund assets, which is used to discount payments to be made in the future. Qualified actuaries can differ with regard to their best estimates of the assumptions to be used in a particular situation. Although their assump-

tions may differ, they may all be considered reasonable. Of course, the effect will be that each will arrive at a different, perhaps widely divergent, result, each of which may be "reasonable" because it probably will fall within a range of answers which could be considered "reasonable."

It is also often the case in multiemployer pension funds that employee data is not complete. The question then arises how to treat the "unknown" data. The census data are obviously important because, calculation of unfunded vested benefit liability of the Fund depends, among other things, upon a determination of how many participants are vested; their age; and their total services, for vesting and pension purposes.

Moreover, in some cases, including a fund serviced by the Martin E. Segal Co., even when the fund provides to the actuary the known census data it does not provide exact information on age and service for each participant; and, most importantly, no distinction is made between "vesting" service and "benefit" service, and between non-contributory versus contributory service. These distinctions can be critical, particularly when the fund provides census data to the actuary in five-year groupings or "cells" by age, service, etc.; and not in such a way as to provide the actuary information that would permit him to determine with any degree of precision either the fact, or the exact nature of the vesting or benefit status of participants.

Thus, even with respect to "known" data, the actuary must make assumptions on which to base his calculations. He must assume, for example, that every participant in a given cell has the average age and service of the cell grouping; *e.g.*, that every person in the cell encompassing age grouping 36-40, with 10 to 14 years of service is, in fact 38 years of age and has 12 years of service. Those assumptions, if valid, would be sufficient, not only to vest every member of the cell but to qualify each such member for benefits based on 12 full benefit years. Assumptions of this sort are, of course, perfectly acceptable from the actuary's standpoint for *funding* purposes where mere approximation is adequate, particularly where any inexactitude is likely to err on the side of conservatism, and later revision of

assumptions is possible. Where immutable UVBL calculations are involved, however, assumptions about the "average" nature of census data in given cells; and particularly assumptions that ignore material distinctions between "vesting" service and "benefit" service, and between non-contributory versus contributory service for vesting purposes all create the possibility, indeed the the likelihood, of skewing the results on which liability depends. Obviously, different assumptions about "unknown" facts, factual verification of "unknown" facts and updating, particularly of "known" census data, are all possible; and reliance upon complete and up-to-date facts would produce different results. While each such result might be "reasonable," each unquestionably would produce different withdrawal liability calculations.

16.25. In addition to the assumptions discussed above other estimates may go into determinations of withdrawal liability. Asset valuations, as I suggested above, entail some judgmental determinations by accountants or other evaluators. The actuary in turn may use an averaging procedure to determine the actuarial value of plan assets. Such averaging procedures, which are permissible under ERISA, are designed to soften the effect of sharp fluctuations in the market value of assets on the annual acturial valuations. For withdrawal liability purposes, some actuaries feel it is appropriate to use this actuarial value of assets while others feel that the market value of assets must be used. Obviously, different techniques for valuing assets produce different asset totals which, in turn, affect UVBL.

16.26. The concept of a "range of reasonableness" does not solve, if anything it may magnify, the problem of fixing a specific amount of a plan's unfunded vested benefit liability and an individual withdrawing employer's liability. MPPAA requires actuaries, for the first time, to utilize their skills and perform functions for which their professional training was never designed, *i.e.*, to make final, conclusive determinations about dollar amounts of liability, imposed upon a party who has no control over that liability, based upon assumptions with respect to past events not fully known and future events entirely unknown. I seriously question,

absent the opportunity for periodic, or if not periodic, then at least later, consideration that any rational basis can be found to determine whether any given assumption was "reasonable" when made. Also there is doubt whether any aggregate of assumptions, some of which were unreasonable, could, nevertheless, be determined to be "not unreasonable in the aggregate."

16.27. The standards of the statute are so broad as to permit a wide spectrum of alternative assumptions that may produce widely varying computations of unfunded vested benefit liability. The latitude which MPPAA provides actuaries in making "assumptions" for UVBL purposes is graphically demonstrated by reference to another MPPAA case in which Republic is a party and in which I have participated. In that case, *Johnson Motor Lines, Inc.* v. *Central States, Southeast and Southwest Areas Pension Fund*, C.A. No. 81-C-3703 (N.D.Ill. filed July 1, 1981), the Fund's actuary at three different times calculated three separate UVBL figures which ranged from an early figure of $2.047 billion to a later calculation of $4.108 billion and an ultimate determination that the actual figure to be used was $3.57 billion. The actuary, at the time of his second, and highest, estimate attributed a proportion, although not all, of the change to a change in assumptions regarding noncontributory past service credit. The final change from $4.108 billion to $3.57 billion was attributed to a change in the actuary's assumed future rate of return on investment. At the time the actuary submitted each of those UVBL estimates to the Fund as a basis for calculating withdrawal liability it reported to the Trustees that each was "reasonable." I do not challenge that conclusion as applied to any of his three estimates. My point is made, I believe, however, by noting that simply by virtue of the actuary's decision that he would rely upon one assumption about unknown "facts" rather than another, the resulting calculation of Johnson's withdrawal liability moved from about $10 million (based on UVBL of $2.047 bil-

lion), to over twice that amount (based on UVBL of $4.108 billion), before settling at $16.658 million.

/s/ Joseph A. LoCicero

JOSEPPH A. LOCICERO

Subscribed and sworn to me this 13th day of December 1982.

[SEAL]

/s/ Sopie Karely

SOPHIE KARELY
Notary Public

STEPTOE & JOHNSON
Chartered
1250 Connecticut Avenue
Washington, D.C. 20036

Paul J. Ondrasik, Jr.
(202) 862-2111

BY CERTIFIED MAIL

April 6, 1983

Republic Industries, Inc.
P.O. Box 21577
Charlotte, North Carolina 28231

Re: Republic Industries, Inc./Johnson Motor Lines, Inc. Withdrawal Liability to the Teamsters Joint Council No. 83 of Virginia Pension Fund

Gentlemen:

We serve as counsel to the Teamsters Joint Council No. 83 of Virginia Pension Fund ("Pension Fund" or "Fund"). As you are aware, Johnson Motor Lines, Inc. ("Johnson") effected a total withdrawal from the Pension Fund on August 8, 1980, which subjected it to a withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). By letter dated July 9, 1982, the Pension Fund made demand on Republic Industries, Inc. ("Republic"), Johnson's successor-in-interest, to satisfy Johnson's withdrawal liability to the Fund under the provisions of the MPPAA, in accordance with a payment schedule devised by the Fund. The total amount of Republic's withdrawal liability, as calculated by the Fund's actuary and set forth in the letter, was $189,107. The Fund offered Republic the option of paying this amount in one lump sum or in thirty-seven monthly installment payments of $5,651 followed by a thirty-eighth and final payment of $4,269.

The Pension Fund recently has discovered that an error was made in calculating Republic's withdrawal liability, with the result that the proper amount of Republic's share of the un-

funded vested benefits liability of the Pension Fund is $181,805, rather than $189,107. As is readily apparent, this adjustment represents a *decrease* in liability of $7,302. The amended calculation of withdrawal liability, as well as a revised schedule of payments, is contained in the exhibit attached to this letter, which was prepared by the Pension Fund's actuary.

Under this revised schedule, Republic can satisfy its withdrawal, liability through thirty-eight monthly installments of $5,344, plus a final payment of $2,412. Because Republic has made eight installment payments of $5,651 toward its withdrawal liability to date, it need pay only $2,888 on May 1, 1983 to remain current on its withdrawal liability payments, in accordance with its statutory obligation under the MPPAA. Thereafter, it will be obligated to make twenty-nine installment payments of $5,344, due the first day of each month, plus a final partial payment of $2,412.

We have sent a copy of this leter to your attorneys, Bridgeman & Associates. If you have any questions concerning the matters discussed above, please have your counsel contact me.

Sincerely,

Paul J. Ondrasik, Jr.
Counsel for Teamsters Joint
Council No. 83 of Virginia
Pension Fund

EXHIBIT I

TEAMSTERS JOINT COUNCIL NO. 83 OF VIRGINIA PENSION PLAN

Basis For Withdrawal Liability Calculations for Johnson Motor Lines

1. Date of Withdrawal: August 8, 1980

2. Date first obligated to contribute: January 1962

3. Contributions made or required to be made for each of the Plan years beginning January 1, 1975 and ending with the plan year immediately prior to withdrawal:

1975	$ 27,319.00
1976	34,576.00
1977	34,265.40
1978	43,501.00
1979	36,059.00
Total	$175,720.40

4. Number of contribution base units for the Plan years in item 3:

1975	1,317 weeks
1976	1,383 weeks (Casuals: 271 days)
1977	1,270 weeks (Casuals: 331 days)
1978	1,402 weeks (Casuals: 36days)
1979	1,023 weeks

5. The highest contribution rate in effect during the period beginning January 1, 1976 and ending with the actual date of withdrawal:

   $46 per week

6. Total employer contributions for each of the complete plan years beginning January 1, 1975, reduced by contributions for the respective Plan years made by sub-

stantial employers[1] no longer obligated to contribute to the Plan as of April 29, 1980:

1975	$ 4,299,595.10
1976	5,351,886.34
1977	6,499,746.59
1978	7,442,444.88
1979	8,972,943.07
Total	$32,566,615.98

[1] For this purpose, "substantial employer" means:

i. an employer that contributed, in any one plan year, at least one percent of total employer contributions or, if lower, $250,000, and

ii. any other employer that was a member of an employer association, a group of employers covered by a single collective bargaining agreement or a group of employers covered by agreements with a single labor organization, if the contribution obligations of all members of the group ceased in a single plan year and the group's aggregate contributions to the Plan in any one plan year totalled at least one percent of total employer contributions, or, if lower, $250,000.

7. Aggregate present value of vested benefits as of 12/31/79: $90,398,689.

8. Market value of assets as of 12/31/79: $56,704,353.

9. Unfunded present value of vested benefits as of 12/31/79: $33,694,336[2]

10. Johnson Motor Lines' proportional share of the unfunded present value of vested benefits:

$$\text{Item 9} \times \frac{\text{Item 3}}{\text{Item 6}} \qquad \$181{,}805$$

NOTE: Deductible equals 0 since $181,805 is greater than $150,000.

11. **Highest three-consecutive-year average weeks worked:**

1,394 weeks (1976 through 1978); casuals prorated)

12. Required annual payment:

    (Item 5 x Item 11) $64,133

13. Required monthly payment:

    (Item 12 ÷ 12) $ 5,344

14. Number of monthly payments required (based on amortization at valuation interest assumption, as required by law, of 6%):

    38 months, plus final partial payment of $2,412.

[2] The method used for calculating the unfunded present value of vested benefits involves a blend of interest assumptions. PBGC assumptions in effect for terminating single employer plans (as of December 31, 1979) are applied to that portion of the present value matched by assets at market value; the funding assumption of 6% is used for the remaining portion.

Law Offices
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WASHINGTON D.C. 20024

April 15, 1983

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(202) 484-5911
TELEX 89462

Paul J. Ondrasik, Jr., Esquire
Steptoe & Johnson, Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Republic Industries, Inc./Johnson Motor Lines, Inc.

Dear Mr. Ondrasik:

Your letter dated April 6, 1983, reporting Teamsters Joint Council No. 83 Pension Fund's erroneous calculation of Johnson's asserted withdrawal liability contains errors of its own. From your actuary's own calculations, the demand for $2,888 on May 1 takes into account only the overcharge of the base amount of $307 per month for eight months. It does not take into account that the base amount itself is amortized at 6%, and further that Johnson paid five installments, asserted to be delinquent, with interest rates at rates equated to the prime rate prevailing on the due date thereof plus 2%. Therefore, Republic's overpayments equal $2,456 [eight months × $307] plus .06 × ($307) plus .05 [307/5651] × (given interest payment No. 1) plus . . . etc. In addition, after the overpayment is calculated, Republic must be credited with interest on its monthly overpayments as contemplated and prescribed by

proposed 29 CFR 2664, § 2644.2(d), reported at 48 *Fed. Reg.* 6559 (daily ed. February 14, 1983).

Please submit the Fund's actuary's reevaluation as soon as possible, so as to avoid compounding the problem further.

The foregoing is submitted for avoidance of additional controversy, without concession of or prejudice to Republic's *a priori* claim of invalidity of the Fund's withdrawal liability claim.

Yours sincerely,

/s/ Louis T. Urbanczyk
LOUIS T. URBANCZYK
Attorney for Republic Industries, Inc.

cc: E. S. Riss, Esquire
Mr. Ted Chapman

No. 83-541

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

REPUBLIC INDUSTRIES, INC.,
Petitioner,
v.
TEAMSTERS JOINT COUNCIL NO. 83
OF VIRGINIA PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PAUL J. ONDRASIK
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October 31, 1983

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in ruling that Congress' decision to apply retroactively the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), to employer withdrawals occurring in a limited five-month period prior to the statute's enactment date was neither arbitrary nor irrational.

2. Whether the Court of Appeals erred in ruling that the MPPAA's procedures for assessing, collecting and adjudicating withdrawal liability claims do not violate the due process, jury trial or just compensation guarantees of the Constitution and are not otherwise unconstitutionally vague.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Teamsters Joint Council No. 83 of Virginia Pension Fund ("Pension Fund" or "Fund") respectfully requests this Court to deny the petition for a writ of certiorari sought by Republic Industries, Inc. ("Republic") to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on September 9, 1983.

COUNTER STATEMENT OF THE CASE

Without approving or endorsing Republic's Statement of the Case, the Pension Fund believes that it generally contains the facts material to consideration of the questions presented. Consequently, in the interests of brevity, the Pension Fund will do no more than note the following

exceptions and points of clarification to the material facts outlined therein:

1. Republic's description of the MPPAA's dispute resolution procedures is both inaccurate and incomplete. Contrary to Republic's suggestion, a pension fund's withdrawal liability determinations are not immunized from *de novo* review. As the Fourth Circuit properly recognized, an employer may obtain full judicial review of any legal issues initially determined by a fund in the proceeding to enforce, vacate or modify the arbitrator's decision. Appendix to Petition for a Writ of Certiorari ("App.") 22a. Moreover, while the withdrawal liability provisions afford a presumption of correctness both to a fund's initial determinations and the arbitrator's factual findings, these provisions, as the court below also noted, "do little more than allocate the burden of proof to the [employer] and direct that issues which are close be resolved in favor of the nonjudicial dispute resolver." *Id.* Republic also has failed to point out that an employer's failure to utilize the MPPAA's mandatory arbitration procedures renders the withdrawal liability amounts demanded by a pension fund "due and owing" and thus beyond collateral attack. *See* 29 U.S.C. § 1401(b)(1) (Supp. V 1981).

2. While Republic has insisted throughout this case that the aggregate amount of withdrawal liability assessed against it by the various pension funds exceeds its net worth, no record has been established to support the true extent of its aggregate liability. Because Republic chose to bypass the MPPAA's statutory procedures for disputing the claims assessed by each of the funds and instead mounted facial constitutional challenges to the Act, the actual amount of Republic's total withdrawal liability is far from clear.[1] Further, because this suit

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[1] Indeed, Republic apparently has acknowledged that if certain statutory exemptions apply, its aggregate withdrawal liability could be reduced by approximately eighty-five percent. *See* Brief for Amicus Curiae Pension Benefit Guaranty Corporation at 14, n.4 (4th Cir. filed April 18, 1983).

does not encompass an "as applied" constitutional challenge to the MPPAA, the magnitude of Republic's total withdrawal liability simply is irrelevant to the issues presented herein.

3. Republic's allegations that pre-MPPAA federal law imposed no liability upon it for its withdrawal from the Pension Fund in August 1980 simply is incorrect. At that time, multiemployer plans had been subject to intense regulation at least since the enactment of the Employee Retirement Income Security Act ("ERISA") in 1974 and employers withdrawing from such plans were subject to a contingent liability under the statute up to thirty percent of their net worth. *See* 29 U.S.C. § 1364 (1976). Thus, the MPPAA's withdrawal liability provisions did not create a totally new form of liability, but simply modified ERISA to make an employer's liability upon withdrawal fixed, rather than contingent, and remove the net worth liability limitation.[2]

4. Republic's apparent suggestion that it somehow was prejudiced by the Pension Fund's inconsistent statutory determinations likewise is incorrect. Although the Pension Fund, in the first instance, mistakenly offered Republic the option of satisfying the more lenient withdrawal provisions governing "trucking industry plans", Republic never posted the bond or established the escrow required by those provisions and specifically requested by the Fund, but, instead, unilaterally tendered a letter of credit. Furthermore, since Republic avoided any payments on its withdrawal liability during the Fund's re-

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[2] Nor did Republic's collective bargaining agreements contain an express disclaimer limiting its pension liability to the contributions due the Pension Fund thereunder or otherwise holding it harmless for any of the Pension Fund's unfunded vested benefits. *Cf.* Nachman v. Pension Benefit Guaranty Corp., 446 U.S. 359, 364-65 (1980). Thus, contrary to Republic's contention, Congress' imposition of extra-contractual liability upon withdrawal did not contravene any express provision of its collective bargaining agreements.

examination of the trucking industry issue, it actually profited from the Fund's good faith efforts to comply with the statute. Finally, although the Pension Fund *sua sponte* recomputed Republic's withdrawal liability during the proceedings below upon the discovery of an error, that recalculation resulted in a *reduction* in Republic's withdrawal liability. App. 201a-202a. Such action hardly demonstrates improper "bias" on the part of the Pension Fund, particularly since it was under no duty to reduce Republic's liability in light of Republic's failure to utilize the MPPAA's dispute resolution procedures. *See* 29 U.S.C. § 1401(b)(1)(Supp. V 1981).

SUMMARY OF ARGUMENT

Petitioner's challenge to the Fourth Circuit's decision upholding the constitutionality of the employer withdrawal liability provisions of the MPPAA does not merit the attention of this Court. Unlike the Ninth Circuit in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, a case in which this Court noted recently probable jurisdiction,[3] the Fourth Circuit properly recognized that Congress' imposition of liability upon employers who withdrew from multiemployer pension plans in the brief five-month period prior to the MPPAA's enactment constituted a rational, and thus constitutional, means of effectuating a legitimate governmental goal—the protection of millions of Americans who depend upon the financial integrity of multiemployer pension plans for their retirement security. Indeed, in view of the threat to multiemployer plans presented by employer withdrawals while the MPPAA was under final consideration, the retroactive imposition of such liability was not only rational, but essential to protect a carefully crafted scheme fashioned by Congress to meet a problem of national dimensions.

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[3] Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 705 F.2d 1502 (9th Cir. 1983), *probable jurisdiction noted*, 52 U.S.L.W. 3308 (U.S. Oct. 17, 1983) (No. 83-245).

The Fourth Circuit's decision to uphold such rational Congressional action against due process challenge is fully consistent with the prior precedents of this Court in the area of retroactive legislation, most notably, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975). Moreover, the analytical framework used by the Fourth Circuit—that derived by the Seventh Circuit in *Nachman v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980), from *Usery* and other decisions of this Court—has been employed by virtually every court that has addressed the issue. The mere fact that the Ninth Circuit misapplied *Nachman* in reaching a contrary conclusion presents no compelling reason for granting certiorari in the instant case.

The other constitutional issues raised by Republic—challenges to the MPPAA's procedures for assessing, collecting and adjudicating withdrawal liability claims—clearly do not warrant this Court's attention. As Republic itself admits, not only is there no Circuit conflict with respect to the validity of these procedures, no conflict exists among the district courts. Indeed, more than twenty courts have considered and rejected challenges of this nature. Moreover, even if these questions were otherwise substantial, the instant case provides an inappropriate vehicle for their resolution. Because Republic chose to ignore the MPPAA's dispute resolution mechanism, no record exists as to the actual operation of the vast majority of the procedures Republic has placed in issue. Without such a record, this Court cannot analyze properly the constitutionality of the procedures Congress has fashioned.

ARGUMENT

I. THE COURT OF APPEALS' RETROACTIVITY RULING FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The Court of Appeals' Standard of Review Creates No Circuit Conflict And Is Consistent With Principles Established By This Court

In upholding the MPPAA's imposition of retroactive liability, the Fourth Circuit employed the same due process analysis used by the Seventh Circuit in rejecting similar constitutional challenges to ERISA's termination liability provisions in *Nachman v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980). Adhering to *Nachman's* four-pronged test, the Court of Appeals concluded that Republic had failed to meet its burden of proving that the retrospective features of the withdrawal liability provision were "irrational." Rather, as the Court found, these provisions represented a "rational" Congressional response to a problem of significant national dimensions, and thus survived due process attack. App. 18a-19a.

The analytic framework employed by the Fourth Circuit is wholly consistent with this Court's prior precedents and, in particular, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975). As the Court there articulated, "legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality." *Id.* at 15. Moreover, as a corollary principle, the Court held that the party complaining of a due process violation has the burden of proving that Congress acted in an arbitrary and irrational way as a prerequisite to obtaining relief. *Id.* Applying this "rationality" standard, the Court had little difficulty in upholding a federal statute which obligated coal mine operators to pay "black lung" benefits to employees who had left their employment long before the statute was passed. In so doing, the Court specifically rejected the operators' contention that the im-

position of liability upon them for past, completed acts violated due process. *Id.* at 18-19.

The Seventh Circuit's analysis in *Nachman* rests squarely upon the reasoning in *Usery*. Indeed, the Seventh Circuit reiterated this Court's admonitions in *Usery* that "Congress has broad latitude to readjust the economic burdens of the private sector in furtherance of a public purpose," and that "[o]nly if Congress legislates to achieve its purpose in an 'arbitrary and irrational way' is due process violated." 592 F.2d at 958, *quoting Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 15. Moreover, again relying on *Usery*, the Seventh Circuit noted that retrospective legislation also was to be judged by this standard and thus was valid so long as it represented a rational means to achieving a legitimate Congressional purpose. 592 F.2d at 958. In the Court's view, four factors were relevant to the rationality inquiry: (1) the reliance interests of the parties affected; (2) whether the impairment of the private interest is affected in an area previously subjected to governmental regulation; (3) the equities of imposing the legislative burdens; and (4) the provisions of the statute which mitigate the impact of the burdens. *Id.* at 960.

Although Republic strongly argues that reliance on the rationality test is misplaced, it has cited no case subsequent to *Usery* which casts doubt on the continued validity of that holding or on *Nachman's* interpretation of the standards enunciated therein.[4] Certainly, nothing in *Al-*

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[4] Indeed, Republic's claim of inconsistent precedents relies primarily on Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330 (1935) and Untermyer v. Anderson, 276 U.S. 440 (1928), two cases decided over forty years before *Usery* during the "heyday of substantive due process." S & M Paving, Inc. v. Construction Laborers Pension Trust, 539 F. Supp. 867, 874 (C.D. Cal. 1982). To the extent these decisions retain any vitality, they generally have been limited to their specific facts. *See* United States v. Darusmont, 449 U.S. 292, 299 (1981) (*Untermyer* limited); Usery v. Turner Elkhorn Mining Co., 428 U.S. at 19 (*Alton* distinguished). The contingent liability imposed on employer withdrawals under pre-MPPAA law further distinguishes *Untermyer*.

lied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) repudiates the *Usery/Nachman* analysis. Indeed, if anything, *Spannaus* underscores the propriety of the four-factor rationality test devised by the Seventh Circuit.[5] Moreover, in decisions rendered both before and after *Usery*, the Court has upheld legislative enactments which were retroactive in impact. *See United States v. Darusmont*, 449 U.S. 292 (1981); *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Lichter v. United States*, 334 U.S. 742 (1948); *Fleming v. Rhodes*, 331 U.S. 100 (1947); *United States v. Hudson*, 299 U.S. 498 (1937). These cases illustrate with particular clarity the principle that Congress may legislate retroactively when necessary to effect a rational and legitimate legislative purpose.[6]

The *Usery/Nachman* rationality test not only comports fully with this Court's precedents, but also has been utilized by virtually every court to consider challenges to the constitutionality of the withdrawal liability provi-

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[5] While this Court in *Spannaus* invalidated Minnesota's Private Pension Benefits Protection Act under the Contracts Clause, it reaffirmed the "presumption favoring legislative judgments," and looked to the very factors later adopted by the *Nachman* court to judge the validity of the statute: the nature of the employer's reliance interests, 438 U.S. at 245, the societal problem sought to be remedied by the legislation, *id.* at 246, whether the law operated in an area subject to previous state regulation, *id.* at 250, the equities in relation to the parties affected by the legislation, *id.* at 247-50, and the presence of mitigating factors, if any. *Id.* at 247. Thus, *Spannaus* hardly represents a diminution or modification of the principles outlined in *Usery* or *Nachman*.

[6] It therefore is hardly surprising that the Fourth Circuit found unworthy of comment Republic's contention, supported solely by cases arising in the criminal context, that Congressional enactments properly could be given retroactive application only in extraordinary circumstances. While Congress may lack authority to legislate retroactively in the criminal area, its ability to do so in the civil context, and, in particular, the economic and social welfare areas, is well-settled.

sions, including those few which have struck down their retroactive effective date.[7] Thus, far from creating a disabling conflict within the Circuits requiring prompt resolution by this Court, the opinion below applied a standard of review which has received unanimous endorsement.

B. The Ninth Circuit's Misapplication of the *Nachman* Standards Provides No Basis for Granting Review In This Case

The mere fact that the Ninth Circuit misapplied the *Nachman* test does not present adequate grounds for granting the petition in this suit. While the Ninth Circuit's decision to invalidate the MPPAA as applied to preenactment withdrawals necessitated action by this Court,

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[7] *See, e.g.*, Pension Benefit Guar. Corp. v. R.A. Gray & Co., *supra*; Sibley, Lindsay & Curr. Co. v. Bakery, Confectionery & Tobacco Workers Int'l Union, 566 F. Supp. 32 (W.D.N.Y. 1983); Board of Trustees, Western Conference of Teamsters Pension Trust Fund v. J.N. Ceasan, 559 F. Supp. 1210 (N.D. Cal. 1983); Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund, 553 F. Supp 523 (W.D. Wa. 1982); Coronet Dodge, Inc. v. Speckmann, 533 F. Supp. 518 (E.D. Mo. 1982); Fur Manufacturing Industry Retirement Fund v. Lazar-Wisotzsky, Inc., 550 F. Supp. 35 (S.D. N.Y. 1982); Textile Workers Pension Fund v. Standard Dye Co., 549 F. Supp. 404 (S.D.N.Y. 1982); Peick v. Pension Benefit Guaranty Corp., 539 F. Supp. 1025 (N.D. Ill. 1982); S & M Paving, Inc. v. Construction Laborers Pension Trust, 539 F. Supp. 867 (C.D. Cal. 1982); I.U.E. Pension Fund v. Erie Universal Products Corp., 4 EBC 1357 (D.N.J. 1983); Washington Star Co. v. International Typographcial Union Pension Fund, 4 EBC 1145 (D.D.C. 1983); Victor Construction Co. v. Construction Laborers Pension Trust, 3 EBC 1765 (C.D. Cal. 1982); Ells v. Construction Laborers Pension Trust, 3 EBC 1449 (C.D. Cal. 1982); Warner-Lambert Co. v. United Retail & Wholesale Employees Teamsters Local No. 115 Pension Plan, —— F. Supp. ——, No. 82-1080 (E.D. Pa. Aug. 10, 1983); Republic Industries, Inc. v. New England Teamsters & Trucking Pension Fund, —— F. Supp. ——, No. 82-2551 (D. Mass. Aug. 3, 1983); Transport Motor Express, Inc. v. Central States, Southeast & Southwest Areas Pension Fund, —— F. Supp. ——, No. 81-C-4535 (N.D. Ill. May 19, 1983); Speckmann v. Paddock Chrysler Plymouth, Inc., —— F. Supp. ——, No. 82-0888-C(c) (E.D. Mo. May 6, 1983).

review of the Fourth Circuit's ruling is unnecessary since that Court not only applied the proper legal standards, but also reached the correct result.

In assessing the rationality of the MPPAA's retroactive impact, the Court below took due account of the salutary Congressional goals served by the withdrawal liability provisions—the protection of an employee's expectation of receiving his vested pension benefits. Moreover, the Court properly recognized that enactment of the withdrawal liability provisions was necessary to assure the availability of funds to provide those benefits at retirement, since multiemployer funds then were faced with a financial crisis attributable largely to employer withdrawals.[8] In the Court's view, Congress properly could conclude that these considerations far outweighed any countervailing expectations of limited liability possessed by employers, particularly since those expectations already had been eroded by the extensive prior regulation of multiemployer plans and the contingent withdrawal liability imposed by ERISA itself.

When Congress' decision to impose liability upon employers who withdrew in the brief five-month period prior to the MPPAA's enactment is considered in this context, the rationality of that judgment is self-evident. There clearly is little difference in the effect of with-

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[8] As the Court of Appeals noted, the withdrawal liability provisions were spawned in part by a report prepared by the Pension Benefit Guaranty Corporation which was submitted to Congress in July, 1978. This report established that a substantial number of multiemployer plans were experiencing financial difficulties which could result in imminent plan terminations, and thus jeopardize the retirement security of millions of Aemricans. *See* Multiemployer Study Required by P.L. 95-214 (1978). Further, the Report concluded that employer withdrawals were a primary cause of these financial problems. Confronted with the decision of who should bear the economic burden of unfunded pension liability left by withdrawing employers, Congress determined that the employers themselves, "the parties whose conduct threatens the harm," were the logical choice. Peick v. Pension Benefit Guaranty Corp., 539 F. Supp. at 1046.

drawals occurring shortly before and shortly after the statute's enactment; both affect plan stability in precisely the same way, and, in the absence of some remedial measure, unfairly burden non-withdrawing employers and ultimately plan participants themselves with the responsibility of absorbing the shortfall. *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. at 1055. Moreover, as the Court of Appeals observed, Congress was concerned that, without a retroactive effective date, opportunistic employers would be encouraged to take advantage of the inherent delays in the legislative process and withdraw from multiemployer plans, particularly since its deliberations on this issue were well publicized. Such withdrawals not only would have exacerbated the very problems that Congress was attempting to remedy in the MPPAA, but also could have rendered the solution it had arrived at ineffective. As the Fourth Circuit correctly held, Congress' decision in the face of this dilemma to impose a brief period of retroactive liability could not be deemed "irrational". App. 15a-16a. Indeed, it appears to have been essential to protect the carefully crafted legislative solution Congress had fashioned.[9]

II. THE COURT OF APPEALS' HOLDING ON REPUBLIC'S REMAINING CONSTITUTIONAL ISSUES CREATES NO CIRCUIT CONFLICT AND FAILS TO PRESENT SIGNIFICANT ISSUES JUSTIFYING REVIEW

Republic's constitutional challenges to the MPPAA's procedures for assessing, collecting and adjudicating with-

[9] But for the contrary result reached by the Ninth Circuit, the decision in this case would provide virtually no justification for review in this Court. Nonetheless, should the Court determine that the retroactivity issue presented herein warrants further scrutiny, the Fund would urge that this case be consolidated with *Gray* for briefing and argument on the merits. Joint consideration of these conflicting decisions, the only appellate decisions to date which address the constitutionality of the MPPAA's retroactive effective date, cannot help but insure a more complete exposition of the retroactivity issue, and thus aid the Court in its analysis of this question.

drawal liability claims clearly do not warrant this Court's attention. As petitioner concedes, these same claims of constitutional infirmity have been raised without success in "scores of cases" in the lower courts.[10] Thus, no conceivable conflict exists which would justify this Court's review.

Nor, as this universal agreement suggests, do petitioner's constitutional challenges present substantial constitutional questions. As the Court of Appeals recognized, it is too late in the day to argue that compulsory arbitration, per se, denies due process of law. Congress may permissibly delegate adjudicative functions to an arbitrator where, as here, the arbitrator operates within a discernible statutory framework and judicial review ultimately is available. *See Andrews v. Louisville & NRR*, 406 U.S. 320, 322 (1972); *Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290, 294-95 (3d Cir. 1982). *See also First Jersey Securities v. Bergen*, 605 F.2d 690, 697 (3d. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

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[10] *See, e.g.*, Board of Trustees, Western Conference of Teamsters Pension Trust Fund v. J.N. Ceazan, 559 F. Supp. 1210 (N.D. Cal. 1983); Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund, 553 F. Supp. 523 (W.D. Wa. 1982); Coronet Dodge, Inc. v. Speckmann, 553 F. Supp. 518 (E.D. Mo. 1982); Fur Mfg. Indus. Retirement Fund v. Lazar-Wisotzsky, Inc., 550 F. Supp. 35 (S.D.N.Y. 1982); Textile Workers Pension Fund v. Standard Dye Co., 549 F. Supp. 404 (S.D.N.Y. 1982); Peick v. Pension Benefit Guaranty Corp., 539 F. Supp. 1025 (N.D. Ill. 1982); S & M Paving, Inc. v. Construction Laborers Pension Trust, 539 F. Supp. 867 (C.D. Cal. 1982); Washington Star Co. v. International Typographical Union Pension Fund, 4 EBC 1145 (D.D.C. 1983); Victor Construction Co. v. Construction Laborers Pension Trust, 3 EBC 1765 (C.D. Cal. 1982); Ells v. Construction Laborers Pension Trust, 3 EBC 1449 (C.D. Cal. 1982); Warner-Lambert Co. v. United Retail & Wholesale Employees Teamsters Local No. 115 Pension Plan, —— F. Supp. ——, No. 82-1080 (E.D. Pa. ug. 10, 1983). *See also* Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund, 534 F. Supp. 1340 (E.D. Pa.), *rev'd on other grounds*, 693 F.2d 290 (3d Cir. 1982).

Moreover, neither the method of initially computing an employer's withdrawal liability nor the presumptions of correctness afforded both to the fund's determination and the arbitrator's award violate due process. As the Fourth Circuit recognized, these presumptions do little more than allocate the burden of persuasion to the employer, App. 22a, and are not unlike the traditional deference given to administrative decisions and arbitration proceedings which later come before a court for review. And, as this Court recently observed, "when Congress creates a statutory right, it clearly has the discretion in defining that right to create presumptions, or assign burdens of proof or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right." *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 102 S. Ct. 2858, 2878 (1982).

Petitioner's generalized claim of institutional bias on the part of the Trustees who make the initial determination is equally without merit. Although these Trustees represent fiduciaries to the Fund and its participants and beneficiaries, this fact, in and of itself, is insufficient to support a claim of unconstitutional bias. Rather, as this Court recently had occasion to note, "[s]uch assertions require substantiation before they can provide a foundation for invalidating an Act of Congress." *Schweiker v. McClure*, 465 U.S. 188, 196 n.10 (1982); App. 21a, n.13.

Petitioner's Seventh Amendment and vagueness challenges likewise are too insubstantial to warrant review. As this Court has observed time and again, the right to jury guarantee applies only to suits which existed at common law and not to cases, such as this, involving Congressionally created "public rights." *See Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 458 (1977); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1931). Petitioner's vagueness challenge could succeed *only* if Republic could demonstrate that "the law is impermissibly

vague in *all* of its applications." *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 490 (1982). As the Court of Appeals correctly observed, however, the MPPAA provisions cited as facially vague, read in context and in conjunction with the legislative history of these provisions and applicable regulations, provide sufficient guidance to withstand constitutional attack. App. 27a.

Lastly, Petitioner has failed to demonstrate that its claims that the withdrawal liability provisions either constitute a taking without just compensation or an unconstitutional deprivation of assets without a prior impartial hearing raise significant constitutional questions. Even assuming *arguendo* that Republic could timely raise the taking issue,[11] no unconstitutional taking can occur in instances, such as this, where the alleged interference arises from a public program which merely adjusts the benefits and burdens of economic life. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Nor does the requirement that employers make payments while they are contesting their withdrawal liability in compulsory arbitration deprive them of property in violation of due process of law. Not only is there no deprivation of property, since the employer may refuse to make these payments, but, as the Court of Appeals correctly found, a hearing prior to the implementation of the MPPAA payment procedures simply is not mandated by the due process clause. App. 23a-24a.

Even if these constitutional challenges otherwise presented substantial issues, this is an inappropriate case in which to resolve them. Republic purposely failed to avail itself of the dispute resolution procedures established by the MPPAA for contesting the Pension Fund's withdrawal liability assessment, and, instead, mounted a facial

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[11] As the Fourth Circuit noted, it is "questionable" as to whether Republic properly could assert its "taking" issue since that issue was not raised in the district court. App. 25a.

assault on the entire statutory scheme. As a result, no record exists as to the actual effect of these procedures. As this Court has consistently ruled, however, parties cannot legitimately raise complaints about the manner in which a federal statute has been or will be applied in specific circumstances without prior recourse to such procedures and the establishment of a factual context in which to pass on the constitutional challenges. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 101 S.Ct. 2352, 2371 (1981); *W.E.B. DuBois Clubs of America v. Clark*, 389 U.S. 309 (1967). Thus, petitioner's failure to utilize the MPPAA's arbitration provisions have precluded those procedures from being placed in a posture appropriate for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 83-541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

REPUBLIC INDUSTRIES INC.,
Petitioner,

v.

TEAMSTERS JOINT COUNCIL
NO. 84 OF VIRGINIA PENSION FUND,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

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Petitioner, Republic Industries, Inc. ("Republic") submits this brief in reply to the brief in opposition filed by Respondent, Teamsters Joint Council No. 83 of Virginia Pension Fund (the "Fund"), and to the *amicus* brief filed by the Pension Benefit Guaranty Corporation ("PBGC"). Petitioner prays that the Court promptly grant this petition and consolidate this case for argument with *Pension Benefit Guaranty Corporation* v. *R.A. Gray & Co.*, No. 83-245, and *Oregon-Washington Carpenters-Employers Pension Trust Fund* v. *R.A. Gray & Co.*, No. 83-291, *probable jurisdiction noted*, 52 U.S.L.W. 3308 (U.S. Oct. 17, 1983).

The record made in this case, unlike the spare record in *PBGC* v. *R.A. Gray & Co.*, *supra*, and *Oregon-Washington Carpenters-Employers Pension Trust Fund* v. *R.A. Gray & Co.*, *supra*, shows how the so-called "ameliorative" provisions of the Act and the statutory "exemptions" actually have been applied by the funds, *see* App. at 166a-184a, 201a-207a, how unfunded liabilities come into being and how actuaries go about hypothesizing the amount of "unfunded vested benefit liability" allocated as withdrawal liability, *see* App. at 185a-200a, and what consequences retroactive application of the statute will have, *see* App. at 150a-163a. The Court should not deprive itself of the benefit of this record by holding this petition for disposition in light of *Gray*.

STATEMENT

Respondent asserts that "a pension fund's withdrawal liability determinations are not immunized from *de novo* review" and observes that "full judicial review of any legal issues" may be had. Brief of Respondent at 2. It is true that *some* form of "judicial review" of "legal issues" may be had. *Id.* It is not at all clear, however, what is an issue of "fact," as opposed to one of "law," in a MPPAA arbitration instituted to resolve disputes over the self-interested "determination[s]" of fact and law made by the Fund. 29 U.S.C. § 1401(a)(1). And, it is simply *wrong* to say that *de novo* review of the Fund's self-interested "determination[s]" is available. Under MPPAA, neither the

private arbitrator, nor any Article III court, may review *de novo* the self-interested "determination[s]" made by the Fund. 29 U.S.C. §§ 1401(a)(3)(A), (B), (b)(3), (c). It is the want of *de novo* review, not the want of *some* form of arbitral or judicial review, that raises grave constitutional issues under both Article III and the Due Process Clause of the Fifth Amendment.

Respondent also asserts that there is "no record" showing "the true extent of [Republic's] aggregate liability." Brief of Respondent at 2. This is simply *wrong*. This case comes before this Court because the Court of Appeals affirmed the District Court's grant of the Fund's cross-motion for *summary judgment*. The aggregate amount of the withdrawal liability claimed is both alleged in paragraphs 17 through 21 of the complaint and is otherwise of record by way of the affidavit appearing at pages 158a through 163a of the Appendix filed with this Petition. The well-pleaded factual assertions of the complaint and of the affidavit pertaining to the aggregate liability claimed, which have not been challenged by the Fund in accordance with Rules 12(b) and 56 of the Federal Rules of Civil Procedure, must be taken as true in the present procedural posture of the case. They are true. And, though Republic has the right to contest the statutory validity of these claims, it should be self-evident that the claims would not have been asserted unless the funds had a good faith belief in their validity, notwithstanding the so-called "ameliorative" provisions of MPPAA and any statutory "defenses" available. In any event, *the statute says* the claims are potentially conclusive, 29 U.S.C. § 1401(b)(1), presumptively valid, *id.* §§ 1401(a)(3)(A), (B), and immediately payable, notwithstanding any "defenses" asserted by, or "ameliorative" provisions invoked by, the employer, *id.* §§ 1399(c)(2), 1401(d).

Respondent also says that "because this suit does not encompass an 'as applied' constitutional challenge to the MPPAA, the magnitude of Republic's total withdrawal liability simply is irrelevant to the issues presented herein." Brief of Respondent at 3. This is not necessarily so. The statute already has been applied to Republic by all of the funds which have asserted

claims. If they do not believe their claims are valid, they should not have asserted them. Republic already is *paying* the amount claimed by the Fund on the schedule unilaterally established *ex parte* by that self-interested private entity because the statute *requires* Republic to do so, 29 U.S.C. §§ 1399(c)(2), 1401(d), and because the lower courts denied Republic's plea for preliminary and permanent injunctive relief. Moreover, whether or not "as applied" claims are ripe and properly before this Court prior to arbitration, the magnitude of the withdrawal liability claims asserted against Republic relative to its net worth is material to the "facial" constitutionality of retroactive application of MPPAA. If there are statutory defenses "ameliorating" Republic's aggregate liability, these claims should not have been asserted. That the statute provides no "reasonable ceiling" on employer liability, *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 386 (1980), and permits a crushing liability that substantially exceeds petitioner's entire net worth to be asserted, notwithstanding the so-called "ameliorative" provisions of the statute, illustrates and brings into sharp relief the constitutional vices of MPPAA, particularly insofar as it applies retroactively to petitioners such as Republic who had no actual knowledge of, and no opportunity to alter their course of conduct in light of, the crushing liability retroactively imposed and immediately payable.

Respondent also contends that MPPAA did not create a "totally new form of liability." Brief for Respondent at 3. This is simply *wrong*. Prior to MPPAA, Republic was subject to a contingent *termination* liability—prospectively applied and scrupulously limited by Congress to 30% of net worth. 29 U.S.C. §§ 1362(b)(2), 1364 (1976). It was not subject to any "withdrawal liability." The contingent termination liability to which Republic was subject at the time of the conduct which has triggered its massive, retroactively imposed liability under MPPAA, was dependent on acts *other than* the cessation of contributions to the funds. The contingent liability imposed by 29 U.S.C. § 1364 (1976) was shared with all employers which had contributed to the terminated plan within the 5

years preceding plan termination, including those contributing to a fund at the time of plan termination. And, the liability was a *reimbursement* liability payable to *PBGC*, not a liability payable to the claimant funds under MPPAA.

Indeed, under pre-MPPAA provisions of ERISA, the act later defined as a "withdrawal" by MPPAA—the cessation of contributions—was a liability-mitigating act because employers which had ceased their contributions prior to the 5 plan years preceding the plan termination that triggered the contingent reimbursement liability payable to PBGC had no liability under ERISA. Under MPPAA, what previously was a liability-*mitigating* act retroactively became a liability-*creating* act.

Finally, respondent seems to submit that Republic somehow has "profited from the Fund's good faith efforts to comply with the statute." Brief of Respondent at 4. The Fund has a peculiar concept of "profit." *See* Affidavit of R.B. Riss ¶¶ 43-45, App. at 160a-161a. In any event, the Fund misses the point. Having *admitted* that it twice made errors, first in determining whether a "withdrawal" had even occurred, and second in calculating the amount of the withdrawal liability owed, the Fund goes on to say that the procedural due process issues raised are insubstantial *even though:* (1) Republic cannot obtain *de novo* review of any "determination[s]" made by self-interested claimants either in private arbitration or on judicial review, 29 U.S.C. §§ 1401(a)(3)(A), (B); (2) the risk of error is a significant, if not the primary, factor to be weighed in determining the constitutionality of MPPAA's prepayment mandate; and (3) the potential for arbitrary and capricious enforcement is a critical factor to be weighed in assessing the merits of petitioner's "vagueness" challenge to, *inter alia*, the provisions of 29 U.S.C. § 1383(d) that the Fund now says it "mistakenly" applied, Brief of Respondent at 4, because of its declared "uncertainty" as to the meaning of the term "employer"—which is not even defined—and the "conflicting interpretations" that it had received in "informal discussions with PBGC's staff," in the absence of "any regulations . . .

which offer guidance on this issue." App. at 180a-181a. *Compare id.*, *with* Brief of Respondent at 14 ("MPPAA provisions cited as facially vague, read in context and in conjunction with the legislative history of these provisions and applicable regulations, provide sufficient guidance").

When Republic was confronted with retroactively created, presumptively valid and immediately payable claims far exceeding its entire net worth that had been asserted by self-interested private claimants whose "determination[s]" of fact and law are immune from *de novo* review under the private arbitration scheme mandated by the statute, Republic had no real choice other than to invoke its constitutional right of access to an Article III court. But, whether "as applied" claims are properly before this Court or not, Republic respectfully submits that the record made in this case will assist this Court in addressing the "facial" constitutionality both of retroactive application of MPPAA and of the procedures mandated for the assessment, adjudication and collection of "withdrawal liability" claims.

I

THE CONSTITUTIONALITY OF RETROACTIVE APPLICATION OF MPPAA PRESENTS A SUBSTANTIAL QUESTION

Respondent's assertion that the Fourth Circuit's ruling on the constitutionality of retroactive application of MPPAA presents no substantial federal question warrants no lengthy reply. The Ninth Circuit's contrary ruling refutes it. *Shelter Framing Corp.* v. *PBGC*, 705 F.2d 1502 (1983). It does bear emphasis, however, that respondent's assertion is predicated on the notion that the Fourth Circuit applied the proper standard of review. It did not.

Petitioner, unlike the appellee in *Gray*, submits that the standard of review applied in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) and *Nachman* v. *PBGC*, 592 F.2d 947 (7th Cir. 1979), (*cert. denied on constitutional issues*, 442 U.S. 940 (1979), *aff'd on Statutory grounds*, 446 U.S. 359

(1980), should not govern the constitutionality of statutes—like MPPAA but unlike the statutes at issue in *Usery* and *Nachman*—which are not only "retroactive in impact," Brief of Respondent at 8, but which also *apply retroactively*, *i.e.*, create *new* liability-creating incidents triggering the imposition of *new* and oppressive liabilities for pre-enactment conduct that cannot be altered after the fact. Such a statute, unlike the statutes at issue in *Nachman* and *Usery*, infringes what petitioner submits is a "fundamental" right to "fair warning," *Marks* v. *United States*, 430 U.S. 188, 191-92 (1977), the principle which animates both the Ex Post Facto Clause and the Due Process Clause of the Fifth Amendment. Such a statute, unlike the statutes at issue in *Usery* and *Nachman*, deprives the citizen of a significant "liberty" interest—the opportunity to choose one's course of conduct in light of the law in effect at the time one acts.

If we are to remain "a government of laws and not of men," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 157, 163 (1803), the citizen must be at least presumptively "entitled to be informed as to what the state commands or forbids," for that is one of the presuppositions of "[l]iving under a rule of law." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972). What statute could be more vague in "all of its [retroactive] applications," *Village of Hoffman Estates* v. *Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982), than a statute which has not yet gone through the constitutionally mandated processes for becoming part of the law of the land at the time of the conduct which Congress seeks to subject to regulation after the fact?

Petitioner recognizes that any constitutional principle, carried to its extreme, almost always "proves too much," and that the concept of "fair warning" may not be of controlling significance in and of itself in assessing the constitutionality of statutes which alter merely the procedural or remedial consequences of conduct *malum in se*, *Dobbert* v. *Florida*, 432 U.S. 282, 297-98 (1977), or conduct *malum prohibitum* subject to prior regulation "in the particular" to which the con-

stitutional claimant objects, *Veix* v. *Sixth Ward Bldg. Ass'n*, 310 U.S. 32, 38 (1940), or statutes which retroactively regulate conduct that would not have been altered even if "fair warning" had been given, *Welch* v. *Henry*, 305 U.S. 134, 146-47 (1938). But notice and fair warning is of the essence of due process of law and of the essence of the rule of law itself. And, petitioner respectfully submits that, unless the Court confronts petitioner's "fundamental" right to "fair warning" argument in the course of assessing the constitutionality of retroactive application of MPPAA—an argument that is unlikely to be advanced by any of the parties in *Gray*—the Court may never get to the heart of the issue. An *amicus* brief is not an effective substitute for party status.

II

THE OTHER CONSTITUTIONAL ISSUES ALSO ARE SUBSTANTIAL

The plain language of the statute refutes the contention that the presumptions of correctness "do little more than allocate the burden of proof of the employer." Brief of Respondent at 13. It is not the "preponderance of the evidence" language that is troubling, but rather the language defining *what* an employer must prove by a preponderance: (1) the "*un*reasonable or clearly erroneous" character of the Fund's self-interested "determination[s]," and the "in the aggregate, *un*reasonable" character of the "actuarial assumptions" on which its funded vested benefit liability "determination" rests. 29 U.S.C. §§ 1401(a)(3)(A), (B).

To appreciate the outcome-determinative character of these presumptions, the Court must understand that "actuarial assumptions" are no more than "guesstimates" of the unknown past and the unknowable future, and that it "is the rule, rather than the exception, that actuarial assumptions will turn out to be wrong." Affidavit of Joseph LoCicero, §§ 16.21-.27, App. at 193a-200a. Even seemingly minor alterations in actuarial assumptions can alter the size of the unfunded vested benefit liability allocated as withdrawal liability by *billions* of dollars,

as happened in one of Republic's pending cases. *Id.* § 16.27, App. at 199a-200a.

By converting private arbitration into a proceeding to *review* the "*un*reasonableness" of the Fund's self-interested determinations of fact and law, the statutory presumptions not only saddle Republic with an impossible burden of proof but also deprive Republic of its right to an impartial adjudicator, *i.e.*, one empowered to determine *de novo* the facts upon which the existence and amount of the liability depends, and to apply the law to the facts as found.

If Congress has power to *compel* the adjudication of a money claim advanced by one private litigant against another private litigant via *private* arbitration simply because the claim is statutory, what is left of *Curtis* v. *Loether*, 415 U.S. 189 (1974), or the Seventh Amendment? The rights created by MPPAA are *not* "public rights," *i.e.*, rights which "at a minimum arise 'between the government and others." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 2870 (1982). Compare, App. at 24a-25a, with 29 U.S.C. §§ 1302(b), (f).

Even if Congress has power to delegate the adjudication of federal statutory rights to *private* arbitrators, as opposed to Article I courts or administrative agencies that at least are accountable to the political branches, the Due Process Clause, if not Article III itself, must require at least that Congress prescribe *some* qualifications for the judicial "office" it has created, and that the private citizen's "judgment" be subject to the *de novo* review of an Article III court.

Respondent's own correspondence refutes its contention that the statutory provisions challenged as vague provide sufficient guidance. App. at 180a-181a. If Congress has power to delegate to self-interested claimants the power to make "determination[s]" of fact and law concerning the existence and amount of their adversaries' financial liabilities, determinations which are immunized from later *de novo* review, 29 U.S.C. §§ 1401(3)(A), (B), the Due Process Clause surely must require at least that Congress define what it

means by such terms as "employer," "substantially all," and "primarily engaged in," 29 U.S.C. § 1383(d), as well as "facility," 29 U.S.C. § 1397(a)(2). *See* at 166a-184a.

Finally, both respondent and the Fourth Circuit are wrong in suggesting that there is any "doubt" as to whether the "taking without just compensation" issue was raised in the District Court. It was squarely asserted in paragraph 25 of the complaint. In any event, because the Fourth Circuit addressed the issue, it is properly before this Court. *E.g.*, *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 378 M-1 (1970); *Jones* v. *United States*, 362 U.S. 257, 272 (1960). What reciprocal benefit will Republic, its shareholders, directors, officers and the employees who depend upon Republic for their livelihood derive from the confiscation of Republic's entire net assets? *See Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 134-35 (1978). Or is the forfeiture of one's entire net worth for pre-enactment conduct that cannot be altered after the fact just one of the unfortunate but inevitable costs of living in a "civilized" society?

CONCLUSION

The Court should promptly grant this petition and consolidate the case for argument with *Gray*, Nos. 83-245 and 83-291.

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No. 83-541

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TEAMSTERS JOINT COUNCIL NO. 83
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* FOR THE PENSION BENEFIT GUARANTY CORPORATION

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---

BRIEF *AMICUS CURIAE* FOR THE PENSION BENEFIT GUARANTY CORPORATION

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1. The first Question Presented by the petition for certiorari in this case is identical to the constitutional issue before this Court in *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, No. 83-245, and *Oregon-Washington Carpenters-Employers Pension Trust Fund* v. *R. A. Gray & Co.*, No. 83-291, as to which the Court noted probable jurisdiction on October 17, 1983.[1] 52

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[1] The Pension Benefit Guaranty Corporation (the "PBGC") is filing this brief *amicus curiae* in its capacity as an agency of the

U.S.L.W. 3308 (U.S. Oct. 17, 1983). In light of the Court's order of October 17, it appears appropriate that the present petition be held on the Court's docket until the appeals in Nos. 83-245 and 83-291 are decided.[2]

2. The second Question Presented by the petition is a constitutional attack on the procedures for the assessment, collection, and adjudication of withdrawal liability under the Multiemployer Act (§§ 4219 and 4221 of ERISA, 29 U.S.C. §§ 1399 and 1401).[3] Petitioner concedes, however, that "lower courts have uniformly rejected the argument that [the Multiemployer Act's] compulsory arbitration provision violates either the Due Process Clause or the Seventh Amendment." (Pet. 20). Since the courts have been unanimous on the constitutionality of these procedures,[4] the procedural issues need not be resolved by this Court.

United States Government. Rule 36.4 of the Rules of this Court authorizes such filing, without the consent of the parties, for any "agency of the United States authorized by law to appear in its own behalf." The PBGC has such legal authority pursuant to Section 4002(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1302(b)(1).

[2] The PBGC suggested that the Court take the same action with regard to the petition for certiorari in No. 83-507.

[3] The Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act"), Pub. L. No. 96-364, 94 Stat. 1208 *et seq.*, 29 U.S.C. §§ 1381-1461 (Supp. V 1981).

[4] *See e.g.*, *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83 of Virginia Pension Fund*, 4 Employee Benefits Cases ("EBC"), 2057, 2066-2069 (4th Cir. 1983); *Peick* v. *Pension Benefit Guaranty Corporation*, 539 F.Supp. 1025, 1061-1062 (N.D. Ill. 1982), *argued*, No. 82-2081 (7th Cir. April 13, 1983); *Washington Star Co.* v. *International Typographical Union Negotiated Pension Plan*, 4 EBC 1145, 1152-1153 (D. D.C. 1983), *appeal docketed*, No. 83-1313 (D.C. Cir. March 28, 1983); *Board of Trustees, Western Conference of Teamsters Pension Trust Fund* v. *J.N. Ceazan*, 559 F.Supp. 1210, 1217 (N.D. Calif. 1983), *appeal docketed*, No. 83-1905 (9th Cir. April 22, 1983); *Warner-Lambert Co.* v. *United Retail & Wholesale Employee's Teamsters Local 115 Pension Fund*, No. 82-

3. Moreover, petitioner seeks this Court's review of questions that may become moot after arbitration. Petitioner raised a statutory defense to liability in the proceedings below and admits it will owe no withdrawal liability if it prevails on that statutory defense. *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83 of Virginia Pension Fund,* 3 EBC 2545, 2547 (E.D. Va. 1982); Pet. 8.[5] Both the district court and the court of appeals correctly noted that this issue should be submitted to arbitration as required by statute.[6] This Court should not precipitously consider constitutional issues which may become moot once the congressionally mandated (and court-approved) procedures are followed.

1080, slip op. at 8-17, 29-32 (E.D. Pa. August 10, 1983), *appeals docketed,* No. 83-1676 (3rd Cir. Sept. 12, 1983), No. 83-1682 (3rd Cir. Sept. 16, 1983).

[5] The factual issue is whether two of petitioner's terminals constitute a single "facility" within the meaning of Section 4217(a)(2) of ERISA, 29 U.S.C. § 1397(a)(2). If they constitute two "facilities," Republic would owe no withdrawal liability by operation of Sections 4217(a)(2) and 4209 of ERISA, 29 U.S.C. §§ 1397(a)(2) and 1389.

[6] As the district court noted, "[t]he court is unwilling, even if empowered to do so, which is doubtful, to bypass MPPAA's [the Multiemployer Act's] considered preference of this manner of dispute resolution." *Republic,* 3 EBC at 2547; the court of appeals stated, "[w]e have no doubt that the scheme of the 1980 Act is to require such a question to be decided by an arbitrator rather than a court." *Republic,* 4 EBC at 2062.

For the foregoing reasons, the petition for a writ of certiorari should be held on this Court's docket to await decision in Nos. 83-245 and 83-291, and to be decided in conformity with this Court's ruling in those cases.

Respectfully submitted,

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